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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

CIVIL SUIT NO.201 OF 2012

SAMALIE KATUMBA:.....PLAINTIFF

10

VERSUS

1. STANBIC BANK LTD

2. ANTHONY MUPERE T/a

ARMSTRONG AUCTIONEERS

:.....DEFENDANTS

15 **3. PRINT INNOVATIONS &**

PUBLISHERS LTD

4. GODFREY KATUMBA

BEFORE: HON. MR: JUSTICE BASHAIJA K. ANDREW

JUDGMENT:

20 Samalie Katumba (*hereinafter referred to as the "plaintiff"*)
brought this suit against Stanbic Bank Ltd; Anthony Mupere T/a
Armstrong Auctioneers; Print Innovations & Publishers Ltd and
Godfrey Katumba (*hereinafter referred to as the 1st, 2nd, 3rd and*

5 4th defendant respectively) jointly or severally. The plaintiff is seeking a declaration that the mortgage executed on 13/02/2009 is null and void; an order of a permanent injunction restraining the defendants jointly and severally, their agents, representatives and or workmen from selling, evicting, harassing, intimidating or
10 in any other way interrupting the plaintiff's use and enjoyment of property comprised in Kyadondo Block 212 Plot 299 and Plot 300 at Kyebando, Kampala (*hereinafter referred to as the "suit land"*); general damages, interest and costs of the suit.

The plaintiff's main contention is that the mortgage created on
15 13/02/2009 with her matrimonial home as security is illegal as it was done without her knowledge or consent. The plaintiff alleges that she only gave a written consent as a spouse to the 4th defendant in respect of the legal mortgage created on
14/01/2005 between the 1st and 4th defendant which was fully
20 serviced and discharged on 15/12/2008 when the spousal consent she had given also expired. The plaintiff disputes the second mortgage which the 4th defendant took out from the 1st defendant on 13/02/2009 using the same property as security and contends that the transaction is illegal and invalid as it was
25 done without her knowledge or consent. She maintains that

5 spousal consent is a mandatory requirement under Section 39 of
the Land (Amendment) Act 2004 for such dealings/transactions
to be valid.

The 1st defendant denied the allegations of the plaintiff and avers
that contrary to the plaintiff's allegations, the 1st defendant
10 followed all the requisite mortgage laws and that the plaintiff gave
the necessary spousal consent for the two mortgage transactions.

That the plaintiff's spousal consent for the subsequent mortgage
was not required given the terms of the offer letter in Clause 14.

That the mortgage was a continuing security to the 1st defendant
15 for among others monies intended to be secured. That as such
the spousal consent the plaintiff had given in the 1st mortgage
continued at the time of executing the 2nd mortgage between the
1st and 4th defendant.

The 3rd and 4th defendant in their joint defence contend that the
20 1st mortgage facility was fully paid to the 1st defendant on
15/12/2008 and that the 1st defendant offered another facility
which the 3rd defendant accepted. That all that was required by
the 1st defendant to secure the mortgage in the new facility was
communicated in the offer letter Clause 14 and that the spousal
25 consent of the plaintiff was not one of them. That they are

5 committed to repay the loan and have been making deposits to that effect. That bas such the 1st defendant is not entitled to the reliefs sought.

The 2nd defendant never filed a defence and the matter proceeded against him as if he had filed a defence. At the hearing of the suit

10 Mr. Mbaziira Fredrick represented the plaintiff, Mr. Alex Rezida represented the 1st and 2nd defendants and Mr. Allan Seruliika represented the 3rd and 4th defendants. In the parties' joint scheduling memorandum the following facts were agreed;

1. *There was a duly executed legal mortgage on 14/01/2005.*

15 2. *The plaintiff did give a written consent as spouse to the 4th defendant in respect of the legal mortgage on 14/01/2005.*

3. *The legal mortgage executed on 14/01/2005 was fully serviced and completed on 15/12/2008.*

20 4. *The 4th defendant subsequently took out a second mortgage from the 1st defendant on 13/02/2009.*

The following issues were agreed for determination;

1. *Whether the consent obtained from the plaintiff in execution of the 1st mortgage continued at the time of*

5 *executing the 2nd mortgage between the 1st defendant
and the 4th defendant.*

2. *Whether the 1st defendant is a bonafide mortgagee.*

3. *What remedies are available to the parties?*

I shall resolve Issue No.1 &2 jointly as they are interrelated.

10 *Issue No.1: Whether the consent obtained from the plaintiff
in execution of the 1st mortgage continued at the time of
executing the 2nd mortgage between the 1st defendant and
the 4th defendant.*

15 *Issue No. 2: Whether the 1st defendant is a bonafide
mortgagee.*

The plaintiff's main contention is that the mortgage facility
between the 1st defendant and the 3rd & 4th defendants created on
13/02/2009 against her matrimonial home is illegal and invalid
for want of the necessary spousal consent. That being
20 matrimonial property, any dealings/transaction in it requires the
mandatory spousal consent under Section 39 of the Land
(Amendment) Act (supra). For this proposition counsel for the
plaintiff relied on the case of *Musaija vs. Musaija & O'rs* (HCT-
01-LD-CA-0078 of 2016) in which court cited Enid Tumwebaze

5 **vs. Mpereirwe Stephen & A'nor HCCA No.039 of 2010** to the effect that the provisions of section 39(supra) are mandatory and cannot be circumvented.

The plaintiff's maintained that the consent which she gave for the 14/01/2005 mortgage facility was expressly unequivocal. That
10 *Exhibit D2* - the letter of offer by the 1st defendant to the 3rd & 4th defendants had a time limit, a monetary limit and other limitations of the mortgage. That even though Section 39 (supra) does not provide time or monetary limits, it requires that at least every mortgage on matrimonial property be covered by a separate
15 spousal consent. To support this proposition, counsel for the plaintiff cited the case of ***Alice & Michael Okiror vs. Global Capital Save & A'nor HCCS 149 of 2010*** and opined that the 1st, 3rd and 4th defendants needed a separate plaintiff's spousal consent before creating the 2009 mortgage over her matrimonial
20 home. The plaintiff insisted that the consent in the 2005 mortgage facility was only for the Shs.300,000,000 and that the consent expired on 15/12/2008 upon the particular mortgage being fully paid as shown in *Exhibit 10*.

The plaintiff's evidence in that regard was confirmed by the
25 testimony of DW2 Katumba Godfrey the 4th defendant. Even in

5 the averments in their defence the 3rd & 4th defendant state that the 1st mortgage facility was fully paid to the 1st defendant on 15/12/2008. That the consent of the plaintiff expired with the mortgage facility being discharged and they were offered another facility whose terms never required the spousal consent.

10 Counsel for the plaintiff submitted that the plaintiff's earlier spousal consent cannot in any terms be stretched to cover fresh mortgages. That if that was to be the case, there would have been no any need to execute a fresh mortgage deed in 2009. That the facts as they are now mean that the 2009 mortgage was executed
15 without the spousal consent as required by law hence illegal and invalid.

For their part, the 1st and 2nd defendants maintained that the 2009 mortgage was an extension of the earlier mortgage executed in 2005 in which the plaintiff gave the required spousal consent.

20 That as such there was no need for her to give a fresh spousal consent. That *Exhibit D4* the letter of offer in Clauses 1, 3 and 14.7, clearly states that the mortgage of 2009 was just an enhancement of the 2004 offer. That Shs. 541, 593,000 in the mortgage of 2009 includes a repayment of the balance out of the
25 2005 mortgage of Shs. 300,000,000 as expressly stated in the

5 document. DW1 Mr. Twinamatsiko testified that the asterix in
Clauses 1 and 6.1 of *Exhibit D4* the 2008 offer letter, shows that
there was only one earlier agreement of 2005 which was not to be
varied save for the adjustment of the figures in the amount. DW1
insisted that the offer was a fusion of both the 2005 and 2009
10 facilities and it is the reason why Clause 13.6 therein states that;

*"13.6 Consent to mortgage signed by Samalie Katumba-
spouse on land and property pledged as security registered
in Kyadondo Block 212, Plot 299..."*

The 1st defendant thus totally denied that it ignored provisions of
15 Section 39 (supra). That it was well aware of them but that the
mortgage of 2009 already had the required spousal consent in
place. That this is what distinguishes it from the cases that the
plaintiff has cited above. The 1st defendant maintained that the
reason why the parties created and signed the new mortgage was
20 because the amount of the mortgage had been enhanced. That
Clause 3 of *Exhibit D1* clearly states that the security was to be a
continuing one notwithstanding any intermediate payment of the
whole or part of the monies. That even then, the plaintiff's
spousal consent did not state a limitation on the amount to be
25 borrowed. That if it had stated the limitation the 1st defendant

5 would have needed a fresh consent. That to treat this case differently would be condoning the plaintiff to approbate and reprobate which cannot be permitted.

Counsel for the 1st and 2nd defendants further argued that this court should give the natural meaning to the words of the
10 consent of the plaintiff that she "irrevocably consents to the mortgage" of the suit property. That the parole evidence rule under Section 91 and 92 of the Evidence Act, read together, applies in this case and there must be no attempt to contradict, vary, add to or subtract from the spousal consent's precise words
15 by way of testimony.

Furthermore, that the plaintiff knew about the 2009 mortgage because in *Exhibit D5* which is her affidavit dated 24/05/2012 *Annexure R1* is the 2008 offer letter. That in affect this imputes knowledge on the plaintiff of the very transaction. That in
20 November, 2008 when the facility was enhanced, it had not yet been fully paid. Counsel opined that introducing limitations to the plaintiff's open consent in the circumstances is untenable and that the consent covered the two fused facilities.

5 Counsel for the 3rd & 4th defendants submitted that the law
obtaining in 2005 was the Mortgage Act, Cap 229 and the Land
Act, Cap 227 (as amended) in 2004. That Section 39(1) (b) of the
Land Act (supra) strictly provides that any contract of mortgage
whose security is matrimonial property needs prior consent from
10 the spouse. That this means that for every transaction of
mortgage there must be consent. That in this case there are two
mortgages and one consent for the 2005 facility but not for the
2009 facility. That it is erroneous for the 1st defendant to allege
that the 1st mortgage was a continuing security for future
15 transactions and that it was not necessary for any more consent.
That provisions of a contract between parties cannot override
provisions of the law in Section 39 (1) (b) (supra) which require
spousal consent for every transaction. That even then, the
plaintiff was never a party to the 1st or 2nd mortgage and as such
20 the mortgage cannot be interpreted against her.

Counsel vehemently submitted that there was no evidence that
contents of the 2nd mortgage deed were ever brought to the
plaintiff's attention and as such the claim that there was no need
for fresh consent is untenable. Further, that the claim of the 1st
25 defendant that the document for consent was irrevocable does

5 not mean it extended to future transactions which are not
expressed therein. That for the consent to be irrevocable, it would
only be in respect of the 1st mortgage for which the plaintiff could
not withdraw it. That DW2 Godfrey Katumba also proved that the
4th defendant fully settled the 1st mortgage facility and upon
10 payment of the final installment, he was given a tax invoice
Exhibit D8 and the Bank statement *Exhibit D9* by the 1st
defendant which shows that he paid the final installment on
15/12/2008. Counsel argued that once this final payment on the
1st mortgage facility was made, the consent ceased to exist and so
15 did the 1st mortgage. That there is no way the two documents
could be read as one as they were separate transactions distinct
from each other. That Item (1) in *Exhibit D4* shows that the lease
was an existing facility and that by the November 2008 offer
letter it is marked with an asterisk and that the lease was subject
20 to conditions in agreement of 2004 varied in letter dated
30/06/2005. That therefore the 2nd mortgage was separate and
subject to new terms from those in the 1st mortgage.

That in light of the position of the law, the 2nd mortgage was
unenforceable as it was unlawfully created due to failure to
25 obtain fresh spousal consent. To support this proposition counsel

5 cited the case of *Dushabe vs. Orient Bank Ltd & 2 O'rs Civil Suit No.131 of 2014.*

I will start with sections 91 and 92 of the Evidence Act (supra). Under the parole evidence rule, where there is a document with clear terms no extrinsic evidence to prove the contents thereof
10 may be adduced unless the contents are ambiguous. In the present case they are not. The rule applies equally to the plaintiff as it does to the defendants. The relevant parts of the sections state as follows;

Exclusion of oral by documentary evidence.

15 ***91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.***

When the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required
20 ***by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which***

5 secondary evidence is admissible under the provisions
hereinbefore contained.

92. Exclusion of evidence of oral agreement.

10 When the terms of any such contract, grant or other
disposition of property, or any matter required by law to be
reduced to the form of a document, have been proved
according to section 91, no evidence of any oral agreement
or statement shall be admitted, as between the parties to
any such instrument or their representatives in interest, for
the purpose of contradicting, varying, adding to or
15 subtracting from its terms..."

It is also clear that where a person is not privy to a contract such
person cannot benefit from it or be affected by it. The doctrine of
privity of contract as given in *Black's Law Dictionary 8th Edition*
page 1237 refers to a relationship between parties to a contract,
20 allowing them to sue each other but preventing a third party from
doing so.

The 1st defendant claims the spousal consent for a subsequent
mortgage facility was not necessary while the plaintiff contends
that it was. It is not in dispute that the 2nd mortgage facility deed

5. executed without a fresh consent. The 1st defendant insists that fresh consent was not necessary as the first mortgage was a continuing security and the plaintiff had given irrevocable consent without limit on the amount of money to be borrowed and the 2nd mortgage was thus a continuation of the first one.

10. The position of the law is settled. Section 39 (1) (b) of the Land Act (supra) requires spousal consent for any transaction on the matrimonial property. This means that every transaction of any nature specified in the provision on the matrimonial property requires spousal consent. The suit land in this case is a
15. matrimonial property. The fact of the plaintiff and 4th defendant being spouses is also not in dispute. The relevant part of Section 39(supra) provides as follows;

"39. Restrictions on transfer of family land

(1) No person shall—

20. ***(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

5 (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....”(Underlining for
emphasis mine)

Prior seeking and obtaining of the spousal consent for any
10 transactions on matrimonial property is therefore a mandatory
requirement under section 39(1) (a) and (b) (supra). It would
mean in the instant case that regardless of whether or not there
had been consent to previous dealings over the same matrimonial
property, the 1st defendant ought to have sought and obtained
15 fresh spousal consent before entering into new or additional
mortgage on the same matrimonial property with the 3rd & 4th
defendants. Clearly, the 1st defendant attempted to present the
two transactions as one and the subsequent one as a
continuation of the previous one. This notion is, however, not
20 borne out by the very mortgage documents themselves in the two
transactions. The mortgages are clearly two separate deeds. Even
though the offer letter in 2009 transaction refers to terms the
2004 mortgage, the two do not indicate anywhere that the
mortgages were one and the same or that they were fused.

5 In enacting Section 39 (supra) with a mandatory requirement of
spousal consent for any transaction on matrimonial property, the
Legislature's clear intention was to forestall loss of matrimonial
properties in the event of default which would significantly
impact on spouses as well as the mortgagor. Owing to the
10 likelihood of families being left without homes or very important
source of livelihood, the provision was intended to have spouses
well informed about all facts of the risks their matrimonial
properties were put to so that they could approve with full
knowledge of those facts. It was intended to protect the spouses'
15 and families' right of occupancy of the family properties. Needless
to state, that it would not even cost much for a bank to comply
with the requirements under Section 39 (supra) and that it is the
reason court would not let the 1st defendant circumvent those
clear and mandatory provisions of the law.

20 It must be added that if financial institutions and particularly
banks were permitted to do transactions in the manner the 1st
defendant suggests by its contentions in this case, it would defeat
the whole purpose and effect of the mischief that Section 39
(supra) was intended to cure. It would create the undesirable
25 effect that for as long as a spouse consented to one transaction

5 he or she would have consented to all new and future transactions; which would produce absurd results. Not seeking fresh and obtaining fresh spousal consent for any new or additional transaction on matrimonial property would thus be sinister as spouses would then likely take advantage of by their
10 opposite spouses entering into a transaction of a risk of a nature unknown to them.

Section 39 (supra) is couched in plain and unambiguous words which only need to be assigned their ordinary literal meaning. A transaction is a transaction whether subsequent to another or
15 not. The 1st defendant ought to have sought fresh spousal consent of the plaintiff before executing any subsequent mortgage with the 3rd and 4th defendant over the matrimonial property of the plaintiff with the 4th defendant. The exception to the mandatory requirement of spousal consent is clearly stated
20 under subsection (4) of Section 39 (supra). Otherwise subsection (1) is mandatory that any transaction on matrimonial property shall require spousal consent. The consent given for the 2005 mortgage did not continue or extend to the 2009 mortgage. The law requires fresh spousal consent for any mortgage of
25 matrimonial property. Every single transaction must therefore be

5 consented to by the spouse. There is no such thing as a
"continuing consent" anywhere in the provision of Section 39
(supra). The 1st defendant admitted to not having obtained the
consent in the second mortgage and hence the 2009 mortgage is
illegal and invalid for want of the spousal consent.

10 DW1 admitted in his evidence that two separate mortgage deeds
were executed for each of the facilities and that the 1st defendant
never obtained separate consent nor did it communicate to the
plaintiff before the 2009 mortgage was executed. Given this
evidence, it would be wrong for the 1st defendant to turn around
15 and claim that the plaintiff knew about the mortgages. I find that
the 1st defendant's the claim that the spousal consent covered the
two fused facilities is an attempt to rewrite the law. The 2009
mortgage deed does not in any way state that it has been
consolidated with the 2005 mortgage. If the intention of the 1st
20 defendant was to amalgamate or fuse the two, the mortgage deed
of 13/01/2009 should have expressly stated so. Even then, the
law would still require the spousal consent of the plaintiff afresh.

Besides the above, it is also observed that the plaintiff did not
sign or witness any of the mortgages. She was thus never a party
25 to any of the transactions and therefore the doctrine of privity of

5 contract applies with full effect. *Black's Law Dictionary 8th Edition* page 1237 defines privity of contract as a relationship between parties to a contract, allowing them to sue each other but preventing a third party from doing so.

Applying the doctrine to facts in the instant case, the 1st and 2nd
10 defendant cannot claim that the plaintiff was aware of contents of the mortgage since she was not privy to them. That being the case, the issue of approbating and reprobating the mortgage also does not arise. It is an agreed fact, in the joint scheduling memorandum, that the 2005 mortgage was fully paid. That
15 notwithstanding, it would mean that the 3rd and 4th defendants are privy to the subsequent mortgage as they were involved albeit without the fresh spousal consent of the plaintiff. They are accordingly liable to the plaintiff in that respect. Issue No.1 and 2 are answered in the negative.

20 ***Issue No. 3: What remedies are available to the parties?***

Having found as above, the plaintiff's claim is upheld with the following declarations and orders;

- 1. The 2009 mortgage is illegal, null and void for want of proper spousal consent.***

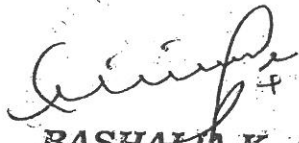
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2. A permanent injunction doth issue restraining the defendants jointly or severally by themselves or through their agents or any one acting under them from selling or evicting the plaintiff from the suit land.

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3. The certificates of title for the suit land shall be handed over to the plaintiff.

4. The plaintiff is awarded costs of the suit to be paid by the defendants jointly in equal share.



BASHAIJA K. ANDREW

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JUDGE

12/10/2018