THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

MENGO

(CORAM: MANYINDO. J. ODOKI, J.S.C., TSEKOOKO., J.S.C.)

CIVIL APPEAL NO. 25 OF 1.994

BETWEEN

MULTI-CONSTRUCTORS LTD…… APPELLANT

AND

UGANDA COMMERCIAL BANK…… RESPONDENT

(Appeal from the Judgment and decree of the High Court of

Uganda at Kampala (L.J.O. Ongom, J.)

dated this August, 1994

IN

CIVIL SUIT NO.641/1989)

JUDGMENT OF TSEKOOKO, J.S.C.

The appellant defaulted in repaying a loan obtained from the Respondent. The loan was secured through a debenture deed whereby assets of the appellant including a building were charged as security. Pursuant to the powers in the debenture, Receivers/ Managers were appointed. They sold the building to the Respondent. So the appellant brought an action in the High Court against the Respondent to declare the sale null and void and claimed for inter alia, a declaration that the appellant is still the legal and rightful owner of property comprised in leasehold Register, Vol. No. 802 Folio 10 known as Plot No.7 Nyondo Road, Industrial Area, Kampala. The learned trial Judge dismissed the suit with costs. Hence this appeal.

The background to this case helps to appreciate this appeal.

The appellant was incorporated in Uganda in June, 1965. During 1968 it acquired land known as Plot Nos. 5 and 7, Nyondo Road, Industrial Area, Kampala. The appellant disposed of Plot 5 and retained Plot 7 which is the subject of this case. I shall hereinafter refer to Plot 7 as the "Suit property."

The appellant opened an account with the respondent during 1968 and was granted overdraft facility in the sum of Shs. 2,800,000/=. It appears that title deeds were deposited by appellant as security.

About 23/8/1968 a company called Multi-Holdings Limited was incorporated, apparently on the advice of the respondent. It was incorporated as Holding Company of the appellant and five other associated Companies. Finance for the various subsidiary Companies was to be effected through Multi-Holdings Ltd., (which I shall hereinafter refer to as the Holding Company) which was not to conduct any active business on its own behalf. It was envisaged that the said overdraft of Shs. 2,800,000/= would be in the name of the Holding Company and the accounts of each of the subsidiaries would be maintained in credit. On 25th September, 1968 the Board or Directors or the holding Company passed a resolution authorising the issue of a debenture in favour of the Respondent to secure repayment of an overdraft of a maximum of Shs. 5,725,000/= but for some unexplained reason the Holding Company on 27th September, 1968 issued a debenture to secure an aggregate sum not exceeding Shs.6,000,000/=. This debenture is exh, P.7 in the proceedings. By Exh. P.7 the Holding Company charged all its undertakings, goodwill, assets and property whatsoever both present and future with the payment and discharge of all moneys and liabilities intended to be thereby secured.

By 23rd November, 1968, the Holding Company appeared to have overdrawn its account with respondent beyond Shs, 6m/=, by an excess of Shs. 2,015,129/70.

During January, 1969, the appellant requested for a further overdraft facility of Shs. 2,400,000/=.

On 22nd February, 1969, the Board of Directors of the appellant passed a resolution authorising the appellant to issue a debenture identical in form and content to Exh, P7 to secure advances in the sum of Shs. 5,725,000/=. However, the appellant issued a debenture dated 5th March, 1969 to secure advances up to Shs. 6m/=. This debenture is Exh. P1. The judgment of Russell, Ag, .J,, in high court Civil suit No. 59 of 1970, Multi-Holdings, and Multi-construction Ltd. vs. Uganda Commercial Bank (1971) 1 ULR 241, treated Exh. P1 as collateral to Exh. P7. (Russell's judgment is Exh. P6). It appears that all the other subsidiary Companies also issued debentures similar in form and content to Exh. P1. and other debentures were issued to secure repayment of loans of the Holding Company because it had

no property of its own. However, paragraph five of the plaint in these proceedings averred that the two debentures and a collateral mortgage were security for these loans.

On 21/5/1969, the Holding Company wrote to the respondent requesting for the overall facility to be increased to Shs. 12m/=.

The respondent replied as follows:-

> "APPLICATION FOR ADDITIONAL FACILITY
>
> We refer to your letter No. JH/STS/8.1 dated 21/5/1969 and another letter or 28/6/1969, on the above subject and have to advise that the Board of Directors nave sanctioned a further Shs. 1.100,000/= on your existing overdraft on account of Multi-constructors. The limit of the overdraft facility on the Multi-constructors account will be Shs. 4,000,000/= and the total facility, excluding the performance bona will be Shs. 10,000,000/=. The faculty will be reviewed during January, 1970, with a view to reducing the limit. Meanwhile, as already agreed, the facility is to be reduced by at least Shs. 3,000,000/= by the end of September, 1969, and thereafter we shall expect monthly reductions by receipts from various contracts."

On 13110/1969 the respondent through its Advocates wrote to the Holding Company and the appellant demanding payment of the sums of Shs. 5,084,521/15 and Shs. 4,204,967/75, respectively, which were standing to the debit of their current accounts, by the 15th October, 1969. As there was no payment, by 15th October, 1969 the respondent appointed Receivers/Managers in the names of Messrs Ian Douglas Hunter and John B. Cartland by virtue of Article 7 of Exh. P7 and Exh. P1.

The Receivers/Managers managed the Suit property (among other assets) for purposes of realising money to clear debts of the appellant and that of the Holding Company and the other associated Companies. As Exh. P.S shows this was a group Managership/Receivership. The Company and the appellant challenged the demand or repayment of the money and the propriety of the appointment of Receivers and Managers by instituting against the respondent the aforementioned High Court Civil Suit No. 459 of 1970. On 29th July, 1971, Russell, Ag.

J., as he then was dismissed the Suit. I refer to this suit because the appellant's averment in the plaint appeared to doubt the appointment of the Receivers and Managers.

During 1972 most, if not all, of the Directors of the various Companies including the appellant's Directors left Uganda in the wake of the expulsion of Asians by Idi Amin.

Thereafter Messrs Ian Hunter and Cartland continued to manage the properties until 31/5/1973 when Cartland ceased and left for his home Country. Ian Hunter remained the Sole Receiver/Manager. On 30/7/1974 he discharged himself from the Receivership/Management of properties in respect is the Holding Company. The appellant remained indebted to the respondent.

The Receiver/Manager valued the suit property at shs. 600,000/= i.e. the annual rent for 7 years but he could not get a purchaser at that value (see Exh. P.10).

There was only an offer of shs. 400,000/= which the Receiver/Manager rejected.

The Receiver advised the respondent (Exh. P10) dated 30th May, 1974 to take over the Plot in part realisation of its security (with possibility of a sale at a later date). The respondent purchased the property on 30th July, 1974 at a cost of shs, 480,000/=. This amount was reduction of appellants indebtedness to the respondent. But by 30th July, 1974 the Holding Company's debt had been paid off through receivership.

Mr. Fredrick Cockerill (PW 1), the Managing Director of the appellant, returned to Uganda in 1982 and began to investigate the fate of the Suit property. He found D.A.P.C. Board in charge of the property. It appears that after departure of the Receiver/Manager, D.A.P.C. Board somehow assumed management of the property even though the respondent had paid for it. According to Exh. P.8, the Board was collecting rents even by 21st May, 1983. But the respondent somehow regained the property later. PW.1 then attempted on behalf of the appellants to reassert the ownership of the Suit property but was resisted by the respondent. The present proceedings were therefore instituted to recover the property. The respondent filed a defence and a counter-claim to the action.

At the commencement of the hearing of the suit three issues were framed, But a fourth one was added subsequently. These issues were:-

1. Whether there was a sale of the Suit property to the defendant.

2. If so, whether the sale was valid.

3. Whether the suit property was sold for a fair market value.

4. Whether the Suit was brought against the right defendant.

No issues were framed in regard to the counter-claim. The learned trial Judge answered issues Nos. 1, 2 and 3 in the affirmative. He answered the fourth issue in the negative. Consequently the Judge dismissed the suit, As regards the Counter-claim, the learned Judge held that the counter-claim was in effect a defence.

The appeal is against the above findings. The memorandum of appeal contained nine grounds but grounds 6 and 7 were abandoned during the hearing of the appeal.

The complaint in the first ground is that the trial Judge erred when he failed to find that the appellant's debenture (Exh. P1) was collateral to Exh. P7, the debenture executed by the Holding Company. That the discharge of the principal debenture discharged the collateral debenture.

Mr. Matovu attacked the finding by the trial Judge that (P. 11 of judgment)

> "(e) That when the holding company was given the facility of Shs 4,204,967/25, this sum became secured under article (3) of the debenture dated 5/3/69 and so the discharge of the indebtedness of the holding Company did not absolve the plaintiff of its outstanding obligation under Exh. P.1."

Mr. Elue supports the finding of the Judge and he reasons that because of the relationship between the Holding Company and the appellant at the time material to these proceedings liability of the two in respect of the two loans was joint and several. That the concession made by Binaisa Q.C, before Russell, Ag. J., in his Judgment in 1971 is explainable on the ground that even though at the time H.C.C.S. No. 459 of 1970 was filed the two companies held separate accounts, because of special relationship the Holding Company could overdraw money from its own account or on the Bank account of the present appellant.

In short, learned Counsel submitted that by the time of the sale of the suit property, the property was charged under - Clauses 2 and 3 of Exh, P1,

In paragraph 5 of its plaint the appellant averred:-

> "5. In 1969 the Defendant granted loans to Plaintiff and its associate Companies pursuant thereto the plaintiff executed two debentures and a collateral mortgage in favour of the defendants to secure the said loan.
>
> 6. On or about the 15th day of October, 1969 the defendant purporting to act under the aforesaid debentures appointed, despite strong objections, a Receiver/Manager who took over the Management of the plaintiff's business."

In its defence the respondent admitted the above averments. The two debentures are exh. P 1 and exh. P 7. Exh.P 1 was referred to in annexure B to the written statement of defence implying that the suit property was security.

Clearly from the inception of these proceedings it was understood that exh. P 1 had been security for repayment of the loans obtained by the appellant from the respondent. Therefore Mr. Elue is correct (though I would say that the opening paragraph (or preamble) in exh. P 1 is the relevant provision rather than clause 2 and 3) in his submissions.

Ground one is directly related to issue No.2, namely whether the sale of the suit property to the respondent was valid.

The contention of the appellant is that the sale was not valid because the suit property was not security for the appellant's indebtedness to the respondent. I have just indicated that this contention is wrong.

It seems to me that the appellant brought the problem to itself in that the management of the finances of both the Holding Company and those of the appellant were in a pool. Furthermore the preamble in Exh.P 1 clearly states that the debenture is for money taken by the appellant and not the holding company. The resolutions of the Board of Directors are not on the record to explain this anomaly. Mr. Matovu has referred us to exhibits P.5 and P.10 among others.

These two documents were produced in evidence by the appellant at the trial. In his evidence P.W.1 had no doubts about the contents of exh. P 5. So it forms part of the appellant's case.

Exh. P.5 is dated 16/8/1974 and was the final report of the Manager and Receiver about Receivership of the appellant and its associate Companies. Exh. P 5 has to be read together with exh. P 3 (Receiver's Abstract).

The opening paragraph of exh. P 5 states –

> "The above six companies a trading group of associated companies linked financially to each other and to Multi-holding Limited. Overdraft facilities had been granted to the group companies and were concentrated in accounts in the names of Multi-holdings Limited and Multi-constructors Limited."

Exh. P 5 continues in para 4 thereof:

> "The overdrawn account of Multi-holdings Limited at 15th October, 1969 was discharged sometime ago; and I sent you a cheque for shs. 1,014,000/ on 13th August, 1974 in REDUCTION of the pre receivership debt of Multi-constructors Limited."
>
> Then para 6 states –
>
> "At the date of appointment of Receivers and Managers, there were small credit balances on the bank accounts of Uganda Plant Hire Limited, Victoria Marines Limited, and Ready Mix Uganda) - Limited which were TRANSFERRED TO MULTI CONSTRUCTORS LIMITED account or otherwise utilised by the Receivers and Managers."

The first and 2nd paragraphs of exh. P 5 on its page 2 continues thus-

> "At an early stage in the Receivership, it was decided, for administration convenience and in view of the very involved nature of the transactions of the companies and their interdependence on each other, wherever possible financial transactions of Receivers and Managers should be concentrated on Multi-holdings Limited and Multi-constructors Limited. It is for this reason that receipts and payments totals of the other Companies are relatively small. The apparent overspending on Multi-Constructors

Limited is accounted for by interest added to the pre-receivership overdrawn balance; this interest is required to be shown in the Receivers Abstract of Receipts and Payments, although not technically a physical out-payment. The last two paragraphs of exh. P 5 state in part that-

"……..Your Bank's losses in terms of the capital sum in debit to Multi Constructors Limited at 15th October, 1969, plus interest taken out of the account subsequently and carried in suspense has been mitigated to the extent of Shs. 1,014,000/= being the amount recently passed over to you in exhaustion of the Receiver and Manager's account in the name of Multi-Constructors Limited. The Receiver and Manager had no other operating accounts for sometime.

You will have a right of claim against the directors who signed guarantees in support of the debenture. The quantum of claim appears to be the amount indicated in the preceding paragraph, All the people concerned are, however out of Uganda, Mr. F. Cockerill is known to be in Zaire but I would not think that either of them would have anything to contribute in the event of your making a claim on them."

It is clear from the contents of the paragraphs of exh. P.5 which I have reproduced above and contents of the Receivers Abstract (exh P.3) that:-

(a) Contrary to Mr. Matovu's submission the appellant still owed money to the respondent by 14/8/1974. Exh. P.3 shows that debts exceeded receipts by about shs. 858,127/75.

(b) The discharge of receivership of the Holding company earlier was for the convenience of the Receivers/Managers.

(c) Liabilities and credits of all the Companies including the appellant and the Holding Company were administered in a pool. In this regard in the absence of oral testimony by the receiver to explain the contents of Exh, P.5 there is no way it can be stated that the Suit property did not form part of the security for the appellant's debt. I think that in this connection the opening paragraph (preamble) of exh. P.5 rather than Clauses 3 and 5 makes the Suit property part of the assets that provided security for the discharge of appellant's liability.

> Accordingly I think that the trial Judge was right in holding that the sale was valid and effectual.

Even if I had held that for some reason the sale was vitiated, for reasons I will state under ground number 5, I think that it would be unjust to declare the sale invalid.

Ground one must therefore fail. Actually this in effect disposes of the appeal. I shall however, consider the other grounds.

In ground two as amended the appellant complains that the trial Judge erred in not finding as a fact that since there was a credit balance at the date of Sale in favour of the appellant there was no justification for the sale of the Suit property.

I have just held that by the time of discharge of receivership (see exh. P.3) the appellant was still in debt by Shs. 858,127/75. This ground must therefore fail.

There was no evidence to establish malafides against the respondent as complained in the third ground which also fails.

Grounds 4 and 5 are more substantial.

In ground four the appellant's complaint is that the learned Judge erred in law and fact in holding that the defendant ceased to be and was not an Agent/Attorney of the plaintiff after the appointment of the Receivers/Managers,

The fifth ground complains that the learned Judge erred in law and fact when he held that the plaintiff ought to have sued the Receiver/Managers and that the defendant was the wrong party.

These two grounds spring from consideration by the trial Judge of issue No. 4. The issue required the Judge to decide whether the suit was brought against the right defendant. The Judge answered it in the negative and consequently dismissed the Suit. The trial Judge considered this issue in the following words (PP 15/16):-

> "There is no dispute that the plaintiff was under Receivership from 14/10/1969 up to 13/8/1974. See exh. P.S Receivers report to U.C.B.; that at the time the Suit property was sold to the defendant on 30th July, 1974 the plaintiff was still under receivership,

that the plaintiff's debenture stipulates in Clause 8 that the Receiver/Manager appointed under the Debenture shall be the Agent of the plaintiff with power to sell or concur in selling any property thereby charged. See clause 8(b) of Exh. P.1.

The only dispute appears to be originating from the interpretation of Clause 13 of exh. P.1 and its application to the facts of this case. Under that Clause the plaintiff appointed the defendant to be its attorney with power to do any acts which the plaintiff ought to do under the covenants contained in the debenture. It was contended for the plaintiff that the agency subsisted up to the time the defendant purchased the suit property which is thus held in trust for the plaintiff. On the other hand, it was contended for the defendant that the powers granted thereunder ceased to have effect upon the appointment of the Receiver/Manager and that the latter was entirely responsible for his actions and the defendant cannot answer for him. It was thus submitted that the plaintiff sued the wrong party. Reliance was placed on the Supreme Court of Uganda decision in Stephen Lubega vs. Barclay's Bank (U) Ltd. C.A. NO. 2 OF 1992 considered a provision similar to Clause 8 of exh. P.1. In that case it was held that this provision was a re-statement of the well established principle that a receiver is an agent of the debtor and the creditor and it was found that the right party to have been sued should have been the debtor Company.

On this authority there is no doubt that the Receiver/Manager appointed by the defendant under Clause 7 of the plaintiff's debenture is agent of the plaintiff with power to sell or concur in selling any property thereby charged and to carry any such Sale into effect by conveying in the name of and on behalf or the plaintiff who is liable for his acts and defaults.

In view of the absence in the Debenture of any prohibition against the defendant purchasing the suit property, this Clause 10 applies to him. This renders its purchase of the Suit property valid and effectual.

I thus find that in law the defendant was the wrong party sued as it was not liable for the acts and defaults of the Receiver.

I also find that the agency relationship which the defendant had with the plaintiff came to an end with the appointment of the Receiver/Manager."

In short the learned Judge held first that the Receiver/Manager acted throughout the receivership as an Agent of the appellant. Secondly, and flowing from that, the Judge held that the agency relationship between the appellant and the respondent terminated upon the appointment of the Receiver/Manager, So the plaintiff should have sued the receiver/Manager instead of the respondent because of alleged wrongful sale of the Suit property.

On ground four Mr. Matovu, learned Counsel for the appellant submitted that there was no provision in the debenture which says that the respondent who by Clause 13 thereof had bee; appointed Agent of the appellant could cease to be an Agent Upon the appointment of a Receiver/Manager. That the appointment of the respondent as Agent of the appellant was irrevocable, contended that the sale of the Suit property was in fact not done by the Receiver/Manager but by thee respondent. I must here point out that Mr. Matovu has changed his stand which he took at the trial, During the trial Counsel conceded that the Receiver/Manager was the Agent of the appellant and that he only ceased to be such Agent of the appellant after the debt was discharged.

Counsel further contended that as Agent of the appellant, the respondent should not have purchased the Suit property.

Mr. Matovu contended again that by virtue of S. 9(c) (ii) of the Banking Act, 1969. the respondent as a banker could only buy in hold Suit property but could not but it outright. That in Exh. P.10 the Receiver/Manager had advised the respondent to buy in the Suit property for purposes of realising the loan money. Counsel relied on Metha vs. A.A.E, Sequiera (1965) E.A. 729. He had relied on it at the trial of this case.

Mr. Elue for the respondent submitted in effect that the agency relationship between the appellant and the respondent ceased upon the appointment of Receivers/Managers and that on appointment of the Receiver/Manager, the appellant could not act on its own and as such the appellant could not appoint Agent/Attorney. He cited this Courts decision in Stephen Lubega vs. Barclays Bank (U) Ltd. Civil Appeal No. 2 of 1992 (unreported) in support of his arguments.

The agency relationship between a Mortgagor and Mortgagee ceases when a Receiver/Manager is appointed to manage the secured property in the sense that both the Mortgagee and the Receiver/Manager cannot manage the mortgaged property concurrently.

In my view it may be accurate to say that the mortgagees agency is suspended because in the event of death, or dismissal of the Receiver/Manager by the mortgagee, the latter automatically becomes the agent of the mortgagor pending appointment of another Receiver/Manager if it is still necessary to have the Receiver/Manager. This I think is the import of Clauses 7 and 8. The relevant part of Clause 7 states that:-

> "……..the Bank. may appoint by write any person whether an officer of the Bank or not to be a Receiver and Manager of the property hereby charged or any part there of and may in like manner from time to time remove any Receiver and Manager so appointed and appoint another in his stead".

And Clause 8 states, in part, that:-

> "A Receiver and Manager so appointed shall be the agent of the Company and the Company shall alone be liable for his acts, defaults and remuneration and he shall have authority and be entitled to exercise the powers hereinafter set forth in conferred upon him by law:
>
> (a) ……
> ……
>
> (b) to sell or concur in selling any property hereby charged or to be hereafter charged in such a manner and generally on such terms and conditions as he shall think fit and to carry any such sale into effect by conveying in the name and on behalf of the Company or otherwise".

Thus as Ian Douglas Hunter was appointed by the respondent under Clause 7 of exh. P.1 as Receiver/Manager, as such Receiver and Manager of the Suit property he sold the Suit property in exercise of powers conferred upon him by Clause 8(b) and he exercised those powers on behalf of the appellant. He is personally liable on anything he does. With respect I do not accept Mr. Matovu's submissions to the effect that Clause 13 of the debenture made it impossible for the appointment of Receiver to supersede the agency relationship between the appellant and the respondent. On the facts of this case the Receiver/Manager was the agent of the appellant at the time of sale of the Suit property and is held responsible for the consequences.

The provisions of Section 352(2) of the Companies Act (Cap. 85 of the Laws of Uganda) puts this matter beyond question by stating that,

> "A Receiver or Manager of any property of a Company appointed as aforesaid (i.e. under powers contained in any instrument like Debenture) shall be personally liable on any contract entered into by him in the performance of his functions except in so far as the contract otherwise provides."

I think that by virtue of Clauses 8 and 7 of exh. P.1, immediately Receiver and Managers were appointed to exercise powers under Clause 8(a) to (g) the agency relationship between the appellant and the respondent ceased to be of effect as respects matters under that Clause and therefore by 30th July, 1974 when Ian Douglas Hunter sold the suit Property, he did so as the agent of the appellant. If the appellant was aggrieved by the sale, 'the appellant should have sought redress against the Receiver and Manager.

The Agency/Attorney relationship between the appellant and the Respondent was irrevocable to this extent that if the appellant were to be wound up or if the Receiver/Manager was removed the agency between the Receiver/Manager and appellant would end and therefore the respondents agency would resume because the respondent needs that relationship for purposes set out in the debenture i.e. sale and conveyance of any of the appellant's property to discharge any debt or liability that may still subsist. See Snowman vs. David Samuel Trust Ltd. (1978) 1 All E.A. 616, Household Centre Ltd. vs. Achelis Ltd. (1967) E.A. 823 at page 825 - E.G. and Matovu Case (Supra).

Seguiera's case (supra) does not support the appellant. Nor do I accept that Section 9(c)(ii) of the Banking Act 1969 is helpful on this ground. I shall revert to the Section when considering ground five, Ground four must fail.

On the fifth ground, the appellants Counsel submitted that Lubega's case (Supra) is distinguishable from the case before u because here the appellant sought declaratory orders that dispossession was wrongful and that the property be restored to the appellant.

Counsel further contended that the suit could not have been filed against the Receiver/Manager who had left the country; and that under Clause 13 of the debenture, the

respondent was the Agent/Attorney of the appellant and the respondent was proved to have been actively involved in irregularities in the disposal of suit property. That according to exh. P.10, Cartland ceased to act as Receiver/Manager on 31st May, 1973 and Ian Hunter retired on 30th June, 1974. This last submission is a misrepresentation of the facts. Exh, P.5 which was tendered by the appellant shows that Hunter did not discharge himself in respect of receivership of the appellant until 13th August, 1974. On 30th June, 1974 he discharged himself in respect of the Holding Company. Paragraph 7 of the Plaint also shows 14/8/74 as date of retirement of the Receiver/Manager.

For the respondent, Mr. Blue submitted that the sale of the suit Property was effected by the Receiver/Manager who was an independent third party. He contended that the appellant should have sued the Receiver/Manager who would have explained why he effected the sale. He argued that a wrong party was sued.

In this case and on the view I take I do not think that because the Receiver/Manager had left Uganda was sufficient reason for the appellant to sue the respondent.

On the question of the Status of the Receiver/Manager in relation to the appellant and respondent, I think that the distinction sought to be made by appellant's Counsel is superficial. In Lubega's Case, the Uganda Government decided to assist farmers with Crop Finance and Transport. Barclays Bank (U)., the respondent in that appeal, was among the Commercial Banks who agreed to assist the farmers. Messrs Ssezibwa Estates Ltd. was a Customer of the Bank. It executed a debenture on 11/10/1982 in favour of the Bank. By January, 1987 Ssezibwa had executed three more debentures. On 30th March, 1989, Ssezibwa executed a 4th debenture in a favour of the Bank for further loans for Crop Finance and the purchase of a lorry which had been allocated to Ssezibwa by the Ministry of Transport and Communication which had imported the lorries for allocation to farmers and dealers in produce. The Bank allowed Ssezibwa an overdraft of shs. 7.5m/= to purchase the lorry. As security the Bank took an all assets debenture for Shs. i5.5m/ and a legal mortgage of the coffee factory of Ssezibwa and the latter's residential house.

Ssezibwa used the overdraft money to purchase a lorry Reg. No. UPF 818 on 26th September, 1989, There was imposed conditions, inter alia, that Ssezibwa should not resell the lorry without the express consent of the Treasury. This lorry was also a subject of a floating charge by virtue of a clause in the principle debenture,

Ssezibwa defaulted in repayment of the overdraft. M/S Sunrise Associated Auctioneers were appointed Receivers by the Bank in accordance with the terms of the debenture. The Receivers impounded the lorry on 22/8/1990 and advertised it for sale on 4/10/1990, But Ssezibwa had, in violation of the conditions under which it acquired the lorry, sold the lorry to Lubega before the appointment of the Receivers. Because he sensed danger, Lubega caused the transfer into his name of the lorry on 19th September, 1990. Then on 27/9/1990 he filed a Suit against the Bank. At the trial the first and second issues were framed thus:-

1. Whether the suit was brought against the right defendant (i.e. the Bank).

2. Whether the transfer of the lorry was valid.

The trial Judge answered the two issues in the negative and this Court upheld her decision.

The trial Judge had held that the Receivers (i.e. Sunrise Associated Auctioneer and Court Brokers) were properly appointed by the Bank as Receivers and Agents of Ssezibwa.

In the leading judgment, Manyindo, **D.C.J.,** stated at page

> "Clause 9 clearly provided that although the respondent would renumerate the Receiver or Receivers, the Receiver would be the Agent of the debtor Company. This provision was a restatement of the well established principle as evidenced by several authorities such as Gosling vs. Gaskell (1897) A.C. 595; Owen vs. Cronk (1985) 1 265; Achelis (Kenya) Ltd. vs. Nazarali and Sons Ltd. and Another (1967) 382; Household Centre vs. Acheli (Kenya) Ltd. (1967) E.A 823; George Baker Ltd. vs. Eyou (1974) 1 All E.R. 900 and Re B. Johnson and Company (Building) Ltd. (1955) Ch 634 that a Receiver is an Agent of the debtor. With respect the trial Judge was in my view quite right therefore in holding that as the Receiver was the Agent of the debtor Company and not the respondent (i.e. the Bank) the right party to be sued would have been the debtor Company. This would have been in accordance with the principle that qui facit per alim facit perse (he who acts through another is deemed to act in person). It is true that a Principal is liable for the acts of his Agents."

With respect I find no difference in principle, between the present case Lubega's case. It does not appear to me to matter whether the reliefs sought were declarations as contended by Mr. Matovu, or not. The essential point is that in cases of this type a Receiver/Manager properly

appointed under the terms of a debenture acts as the Agent of the debtor, and in the case before us the Receiver was the Agent of the appellant.

In my view therefore, a wrong party was sued and the trial Judge was correct in so holding.

Mr. Matovu has, however, submitted that by virtue of Section 9(c) (ii) of the Banking Act, 1969 the respondent could only in hold on the property so as to have its money realised. He relied again on Metha vs. A.A.E. Sequeira (1965) 729 at page 732, and to the Receivers report (exh, P.10). Counsel for the respondent submitted in effect that Segueira case and Section 9(c) (ii) of the Banking Act are inapplicable. This point (S.9) was raised in the Court below by the appellant.

The Sequeira case (Supra) is a decision of the High Court of Kenya and normally it would not even be of persuasive value. But the Judge in that case reviewed decisions of English Courts and the Privy Council on the subject similar to the issue before us now. Therefore I will consider the decision.

Mr. Matovu relied an the passage from the judgment of Landley L.J. in farrar vs. Farrar (1889) 40 Ch. D 395 quoted in Sequeira's case at page 732 which states:

> "It is perfectly well settled that a mortgagee with a power of sale cannot sell to himself either alone or with other, nor to a trustee for himself Downes vs. Grazebrook; Robberson vs. Noris, nor to any one employed by him to conduct the sale: Whitcob vs. Minchin; Martinson vs. Clowes. A sale by a person to himself is no sale at all, and a power of sale does not authorise the donee of the power to take the property subject to it at a price fixed by himself; even although such a price be the full value of the property. Such a transaction is not an exercise of the power, and the interposition of a trustee although it gets over the difficulty so far as form is concerned1 does not affect the substance of the transaction."

I think that Sqeueira's case was decided on its own facts. In that case the plaintiff charged his property to the first defendant to secure a sum of Shs, 50,000/= lent to him by the first defendant. The charge contained a Statutory power of sale under S. 69 (1) of the Indian Property Act, 1882. The plaintiff being in default as to payment of the principal and interest, the property was sold by public auction under the Statutory power of sale without the

intervention of the Court on the instructions of the second defendant acting as agent of the first defendant and was bought by the second defendant acting as agent who purported to buy on his own behalf. The property was transferred into the name of the second defendant and the transfer was registered. The first defendant was a student in U.K. and his affairs relating to the charge were at all material times since the execution of the charge conducted on his behalf by the second defendant, who was his father. The plaintiff filed an action for a declaration that the sale was unlawful and void on the ground that the transaction constituted in effect a sale by a mortgagee exercising his Statutory power of sale to himself as purchaser. the trial Judge held, inter alia, that the purported purchase by the second defendant on his own behalf of the property of which as such agent (of the first defendant) he was conducting the sale was void and unlawful.

In that case the whole affair was a one man show. The second defendant as father of the first defendant managed the affairs of the charge all the time. He instructed Auctioneers to sell the property after insufficient advertisement. The second defendant was at the public auction and virtually paid the barest minimum, He literary supervised the auction.

In the case before us the Receiver/Manager acted for the appellant and because of failure to realise any reasonable offers the Receiver/Manager advised the respondent to take over the Plot in part realisation of its security (with the possibility of a sale at a later date). This advice is contained in fourth last para of Exh. P.10 written by Receiver/Manager who had sold some other houses of the appellant to the respondent during the same receivership, He asked the respondent to take over the property because there was no reasonable bid from any other interested purchaser.

Moreover in Seguiera's case the matter concerned individuals. In the present case the respondent is a public institution involved in the recovery of public funds. Here the question of abuse of trust because of personal gain does not arise. Again in exh. P.5 dated 16/8/1974 which was tendered in evidence by P.W.1, the Receiver/Manager stated in the last paragraph that P.W.1 was at that time known to be in Zaire and his other co-Directors of the appellant were known to be in Kenya. P.W.l in his evidence supports this somehow. One would assume that they would monitor what was happening to the properties left under receivership, P.W.1 waited until after nine years (in 1983) so as to inquire about the Suit Property.

He waited till 1987 when he raised hell. Further he did not file the case till 1989, that is 20 years after his Company, the appellant, went into receivership of 15 years after receivership terminated. P.W.1 ought to have taken immediate remedial action in 1982/83. In all these circumstances it would be most inequitable to hold that the respondent wronged the appellant even if it was possible to do so.

I am also tempted to ask why only this purchase and not the purchase by the respondent of other properties of the appellant was challenged.

I do not believe that the provisions of Section 9(c)(ii) of the Banking Act, 1959 should in the circumstances of this case be construed so as to require the respondent to have perpetually kept the Suit property for ever in hold for the appellant. section 9 (c)(ii) reads as follows:-

> "9 A Bank or Credit institution shall not, with its resources in Uganda,
>
> (c) Purchase or acquire any immovable property or any right thereon except as may be reasonably necessary for the purpose of conducting its business or of housing or providing amenities for its staff, but this paragraph shall not prevent a Bank or credit institution,
>
> (ii) from securing a debt on any immovable property and in the event of default in payment of such debt, from holding such immovable property for realization at the earliest moment suitable to that Bank or credit institution."

True this provision permits the appellant only to hold immovable mortgaged property for realisation at the earliest moment suitable to that Bank Holding such property means buying in .C. Mawanda (D.W.1) in cross-examination stated that it was normal for the respondent to buy mortgaged property in cases where there are no other buyers. He was not contradicted.

AS far as I can ascertain what the respondent did initially 'is what the provisions of Section 9(c)(ii) provides.

But I do not at this moment believe that it would be reasonable to hold that the respondent has kept the Suit Property at the pleasure of the appellant up to now or up to 1987. To do so would in my opinion be most inequitable and unreasonable, In any case during the trial the appellant conceded that the respondent could purchase the property but claimed there was

bad faith. There is no evidence of bad faith on the facts.

In Tse Kwong Lan vs. wong Chit Sem (l983) 1 W.L.R. (1349), a case on which the appellant relied during the trial, the appellant borrowed money from the respondent on a mortgage of appellant's property, The appellant fell into arrears with interest payments and the respondent in the exercise of his power of sale under the charge arranged for the property to be sold by public auction. The auction was advertised. Meanwhile the respondent and his wife, as Director of a Company of which they and their children were the only shareholders, held a Director's meeting of the Company and resolved that the wife should bid for the property on behalf of the Company up to a price of $1.2m. At the auction the respondent mortgagee instructed the auctioneer to announce the reserve to the 30 or 40 persons present. The mortgagees wife was the only bidder. She bid $1.2m and the property was sold to the Company. The mortgagee respondent then started proceedings against the appellant claiming an amount of interest which he alleged to be outstanding after payment of the price obtained at the auction. The appellant by his counter-claim dated 15th December, 1966, applied to have the sale of the property set aside. In November, 1968 the Court gave judgment for the mortgagee respondent for payment of interest found to be due but stayed execution pending determination of the borrowers (appellant's) Counter-claim. Judgment on the Counter-claim was given on May, 15th 1979. The Judge found the $1.2rn had not been a proper price but refused to set aside the sale ,in view of the appellant's delay in pursuing the Counterclaim and awarded damages instead. On rnortgagee's (respondents) appeals, the Court of Appeal set aside that judgment and dismissed the appellant/borrower's cross appeal asking for the sale to be set aside.

On the borrowers (appellant's) appeal to the Privy Council the appeal was allowed, the judgment of the trial Judge was restored.

The Privy Council in part held that "the borrower (appellant) was by reason of his own inexcusable delay in prosecuting the counter-claim, not entitled to have the sale set aside but was entitled to damages……."

This statement equally applies to this case. More so since the respondent purchased more other properties from the same Receiver in connection with appellant's debts and which the

appellant does not appear to have questioned as wrongful. I think that ground five must also fail.

In reality this is the end of this appeal.

I do not consider it necessary to consider arguments in grounds 8 and 9.

In the circumstances, I would dismiss the appeal I would order the appellant to pay the costs of this appeal and of the Court below.

Delivered at Mengo this 4th day of March 1996.

J.W.N. TSEKOOKO,
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL

MASALU MUSENE
REGISTRAR SUPREME COJRT.

JUDGEMENT OF MANYINDO,

I have read the judgment of Tsekooko, J.S.C., in draft. I agree that the appeal has no merit and that is should be dismissed. As Odoki J.S.C., also agrees, it is so ordered. There will be an order for costs in terms proposed by Tsekooko, J.S.C.

Dated at Mengo this 4th day March, 1996.

S.T. MANYIDO

DEPUTY CHIEF JUSTICE

I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL

MASALU MUSENE
REGISTRAR SUPREME COURT.

JUDGMENT OF ODOKI, J.S.C.

I have read in draft the judgment of Tsekooko, J.S.C., and I agree with it and the order proposed by him.

Delivered at Mengo this 4th day of March, 1996.

B.J. ODOKI,

JUSTICE OF THE SUPREME COURT

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MASALU MUSENE
REGISTRAR SUPREME COURT.