

**IN THE SUPREME COURT OF UGANDA**

**HOLDEN AT MENGU**

**(CORAM: ODER, J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C.,**

**KANYEIHAMBA, J.S.C., KIKONYOGO, J.S.C.)**

**CIVIL APPEAL NO.5 OF 1998**

**BETWEEN**

**GENERAL INDUSTRIES (U) LTD ::::::::::::::::::::::::::::::::::: APPELLANT**

**NON. PERFORMING ASSETS**

**RECOVERY TRUST ::::::::::::::::::::::::::::::::::: RESPONDENT**

**(Appeal arising from judgment of the Court of Appeal (Manyindo, D.C.J., Berko JA and Twinomujuni JA) at Kampala in Civil Appeal No. 48/96 dated 28<sup>th</sup> April 1998)**

**JUDGMENT OF J.N. MULENGA J.S.C.**

The appellant in this appeal was the plaintiff in a suit it filed in the Non-Performing Assets Recovery Tribunal (to which I shall refer as “the Tribunal”). The suit was dismissed. The appellant appealed to the Court of Appeal which in turn dismissed that first appeal. This appeal is against the dismissal of the first appeal.

In its original suit the Appellant claimed that a mortgage of several properties dated 12.8.91 which it made jointly with one Haruna Semakula, its Managing Director, to secure repayment of a debt in the sum of shs. 700m/= to Uganda Commercial Bank (U.C.B) was null and void by reason of lack of consideration. The Appellant’s contention was that though it was stated in the mortgage contract that UCB lent to the Appellant shs. 700m/= no such loan was given. The Appellant prayed for, inter alia, a declaration that it was not indebted to the Respondent, and an order cancelling the mortgage. The suit was taken out against the Respondent, and an order cancelling the mortgage. The suit was taken out against the Respondent for two reasons. UCB, to whom the loan was originally owed, had, under the provisions of the Non-Performing Assets

Recovery Trust Statute, 1994, (to which I shall refer as “Statute No.11 of 1994),” assigned the loan to the Respondent. Secondly the Appellant wanted the Respondent to be restrained from selling the mortgaged property, which the Respondent was in the process of doing.

The background to the suit may be summarized as stated below. A company called General Parts (U) Limited (to which I shall refer as “**General parts**”).

Was heavily indebted to UCB in 1990 under a floating overdraft facility. The facility, which initially was limited to shs. 87m/= for a period of three months from 3.3.89, had by November 1990 grown to over shs. 1.46b/= through further overdrafts and accrued interest. Negotiations for some relief for general parts which was not in a position to settle the huge debt that had accumulated were initiated. They lasted for about ten months and culminated in what was termed restructuring and rescheduling arrangement of the indebtedness. The restructuring, as I understand it, is that the debt, which by July 1991 had accumulated to shs. 1.75b/=, was split into two parts of shs. 1,059,557,365/= and shs. 700m/= respectively. The first part, with the interest to accrue on both parts, was to remain the responsibility of General Parts, while the Appellant a sister company to General Parts, was to assume liability to repay the second part. Furthermore “**additional securities properly valued to cover the entire facility**” were to be provided. The rescheduling aspect of the arrangement was as follow: repayment of the first part of the debt and all the interest was to be by monthly installments with effect from 1.7.91. The part is not subject of this appeal. The repayment of the second part, however, which is the subject matter of this appeal, was to be postponed until “immediately” after settlement of the first part.

One feature of the agreed arrangements was for the Appellant to enter into a mortgage contract to secure repayment by it to UCB the second part of the debt. That was done in the mortgage document dated 12.8.91, Exh. P4. Some six properties were mortgaged and it was therein agreed, inter alia, that the Appellant would repay the sum either in full on 1.12.93 or by monthly installments of shs. 38m/= each, commencing on 1.12.93. The debt was never paid. UCB assigned it to the Respondent under the provisions of Statute No. 11 of 1994. In a letter dated 21.12.95, Exh. P1, the Respondent notified the Appellant of the assignment and proposed a meeting for discussions on the paying off of the debt. The proposal did not produce the desired results, and subsequently the Respondent advertised the mortgaged property for auction to realize the debt. In consequence of that, the Appellant filed the suit. The question on which the

suit turned was whether UCB provided consideration for the Appellant’s promise to repay the shs. 700m/= debt and for securing the repayment of the mortgage. The Tribunal decided that UCB provided consideration, and the Court of Appeal upheld that decision.

Before I deal with the grounds of appeal I am constrained to make a few observations about the mortgage document which was produced in evidence by consent, as Exh.P4. It was made on a printed standard form of mortgage, which form obviously was routinely used to secure repayment of loans given to customers by UCB. It is, I think, common knowledge that the use of such standard forms is prevalent among lending institutions. Ordinarily the form is adjusted by insertions and deletions so that only what is applicable to a particular mortgage is included. Exh. P4 however is peculiarly lacking in any indication of effort made to adjust the form, apart from inserting the names and address of the mortgagors, the principal sum to be secured, the rate of interest, and the monthly installments payable, as well as the payment dates. Some words, phrases and expressions which were printed in the alternative and/or were not applicable were left undeleted or unmodified. For example in regard to consideration the printed text reads thus:

***“In consideration of the sum of shillings ..... (shs .....) lent to ..... (hereinafter called the borrower) by Uganda Commercial Bank.....”***

Although this was not the normal case of the Bank lending out money to the customer, the draftsman simply filled in the blanks shs. 700m/= in words and figures as the sum lent, and the Appellant’s name as the borrower. The other striking feature is the omission to clearly identify the signatories to the document. Whereas in the recitals the Appellant and Haruna Semakula are described as proprietor(s) of the mortgaged property, and the former is designated as the borrower and UCB, as the lender, at the foot of the document only the two duly appointed Attorneys of UCB are named and indicated as signing on its behalf, but it is not shown by whom, and for whom the other two signatures, apparently of a DIRECTOR and a DIRECTOR/SECRETARY are appended. What appears is simply

***“SIGNED BY THE SAID (signature)  
In the presence of: DIRECTOR***

*Signed by..... (signature)*  
*And..... DIRECTOR/SECRETARY”*

Ordinarily a limited liability company executes documents by affixing its common seal which is witnessed or authenticated by two directors or one director and the company secretary. Where execution is by agent(s), as was done by UCB, the agent(s) is/are named and stated to sign on behalf of the principal. However, I will not pursue the point any further since those concerned have treated the mortgage as duly executed by the parties thereto. The observations, however, serve to illustrate the ineptitude with which the draftsman drew the mortgage document.

There are nine ground of appeal in the Memorandum of Appeal to this Court. However, in the written submissions filed by the Appellant’s Advocates under r. 93 of the Rules of this Court, the grounds are stated quite rightly in my view, to revolve around two issues. The first issue which encompasses grounds 1,2,3 and 4, is the complaint that the Court of Appeal erroneously relied on extrinsic evidence to uphold the Tribunal’s holding that UCB had provided consideration for the mortgage in form of forbearance. The contention is that forbearance was not the consideration stated in the written mortgage contract, and cannot be implied in the contract on basis of extrinsic evidence. The second issue, as framed in the said written submissions, is:

***“Whether there was sufficient evidence available before the tribunal to prove forbearance as consideration given by UCB.”***

This encompasses grounds 5,6,7,8 and 9. Accordingly, in the written submissions the Advocates for the Appellant combine their arguments of the grounds of appeal under the two issues. In the Respondent’s written submissions however, only grounds 1,2 and 4 are argued jointly. The rest are argued separately. To my mind, the approach by the Advocates for the Appellant is preferable for precision. It is the one I will follow in dealing with this appeal. The source of the problem and basis for the Appellant’s contention on the first issue is the recital of the consideration in the mortgage document. The relevant stipulations on consideration and mortgage (cutting out other may be paraphrased thus:

***“I/we. General Industries (U) Ltd., and Haruna Semakula of P.O. Box 30898 Kampala being registered as the proprietor(s) of the lands comprised in the above mentioned folio ..... in consideration of the sum of shillings seven hundred million only***

*(shs. 700m/=) lent to General Industries (U) Ltd ..... by the Uganda Commercial Bank ..... DO HEREBY covenant with the Bank:-*

*1. To pay the said Bank of their transferees the principal sum of shillings seven hundred million (shs. 700m/=) on the 1<sup>st</sup> day of December 1993 next with interest*

.....  
.....

..... *AND for better securing the payment in the manner aforesaid ..... I/We hereby mortgage to the bank all my/our estate and interest in the said lands.” (emphasis added)*

It is useful to clarify at the out set that both parties to this appeal are agreed that contrary to the statement in the mortgage document. UCB did not lend to the Appellant the sum of shs. 700m/=. Secondly, although there are some remarks in the Appellant’s written submissions which could be construed otherwise, (and which, with due respect, have tended to muddle up the Appellant’s arguments, and for that reason I prefer not to reproduce them here), it is not canvassed that UCB had an obligation to lend that sum to the Appellant and failed to do so. Rather it is common ground that the sum of shs. 700m/= was owed by General Parts to UCB, (being part of a larger debt) and the Appellant assumed the liability to repay it to UCB. UCB therefore did not provide the consideration recited in the mortgage document. However, both the Tribunal and the Court of Appeal found that UCB had provided consideration in another form. I think it is useful to reproduce the findings of both here.

In the course of reviewing the evidence and arguments by Counsel, the Trinal in its judgment observed (a) that there is no hard and fast rule stipulating an appropriate formulation of consideration: and (b) that in the instant case the consideration could have been described differently starting with the words: **“In consideration of UCB delaying repayment ....”**. it then came to the following conclusion:

***“Our study of the evidence of PW1 and perusal of the relevant exhibits, inclusive of the dispute mortgage (Exh. P4) shows that all of them are so onter-linked that their fate seamed inextricably intertwined. The consequence is that PW1, the plaintiff and UCB***

***knew that shs. 700m/= was a loan to the plaintiff. Hence the employment of the words “loans of shs. 700m/=” in Exh. P4 whoever drafted Exh. P4.***

***It is possible to say that a more apt language should have been employed to describe the nature of the loan. But we are convinced that the language used in Exh. P4 does not in any way render Exh. P4 void for lack of consideration.”***

Finally the Tribunal held:

***“In our view the UCB provided consideration for the shs.700m/= loan arrangement. We think that the case of Hassanali K. Kanji vs Gailey & Roberts (1959) EA 521 is authority for this type of arrangement.”***

In the leading judgment, of the Court of Appeal. Berko J.A. said:-

***“Looking at the documentary evidence and the history of the restructuring and rescheduling arrangement I cannot invent any rational theory by which to account for appellant’s agreeing to accept part of the debt of General Parts except that it was for the purpose of benefiting General Parts by procuring for it time to pay the debt. To say otherwise appears to be inconsistent with human nature and the whole character of the transaction. It may be that there was no evidence that the appellant actually used words including that it would be liable if UCB would give General Parts time. But, except on the theory that such was the understanding between the parties, the appellant’s conduct in signing Exh. P4 is inexplicable. I think that there is evidence of forbearance by UCB at the request of the appellant.....”***

Later the learned justice of Appeal held:

***“In this case the period for repayment of the loan of shs. 700/= million which was due immediately was postponed to 1.1,93 (sic). It was because of the appellant’s agreement to have the shs. 700/= million transferred to its account that UCB agreed to defer the repayment. The forbearance was sufficient consideration”***

I should correct two mistakes in this passage. Repayment of the shs. 700m/= was postponed to 1.1.93. Secondly, to avoid confusion it should be stressed that what the Appellant agreed to, was

not “*to have the shs. 700m/= transferred to its account*” but rather to have the debt (or liability for payment) of the shs. 700m/= debt transferred to its account. In the resolution authorizing the transaction, Exh.D14, the Appellant’s Board of Directors, on 9.7.91 “resolved that the company inherits a loan of shs. 700m/= from General Parts;” and that it be repaid in accordance with terms and conditions to be specified by the bank. Two matters are evident from the extracts reproduced above. One is that the Court of Appeal (like the Tribunal before it) relied on evidence, other than the mortgage document itself, to determine what consideration was UCB’s forbearance, namely its acceptance at the Appellant’s request, to postpone the repayment of shs. 700m/=. The second matter is that this holding was not a directly proved fact but was an inference drawn by the court from proved facts.

The Appellant’s contention on the first issue is directly related to these two matters. It is contended that the court erred (as did the Tribunal before it) in incorporating into the mortgage contract a term that was not expressed in the contract as part of it. The contention is based on two arguments. One is that all terms of a legal mortgage have to be expressed in a mortgage document and have to be registered as an instrument under the Registration of Titles Act (RTA) in order to have legal effect, and that therefore a term which is not so registered does not, by virtue of s. 51 of the RTA have legal effect. Secondly it is pointed out that, in regard to a contract, grant or other disposition of land reduced into a document, the Evidence Act, in ss.90 and 91, prohibits the use of extrinsic evidence (i.e. evidence other than the document itself) either to prove, or to contradict, vary, add to, or subtract from, the terms of such document. Accordingly the Appellant concludes, first that the holding, by inference, that UCB had provided consideration in form of its forbearance, amounted to giving legal effect to a term which was non expressed in the mortgage document and which was, therefore, not part of the registered instrument, in contravention of s.51 of the RTA. Secondly, the Appellant concludes that the use of extrinsic evidence was a contravention of ss.90 and 91 of the Evidence Act. the Appellant points out that whereas paragraph (a) of the proviso to s.91 sets up an exception whereby extrinsic evidence may be relied on to show lack or failure of consideration, the extrinsic evidence relied on in the instant case, did not fall within that or any other exception under that proviso.

For the Respondent, it is submitted that neither the oral evidence of the witness, nor the documentary evidence in Exh. P2 and P3, was used to interpret the mortgage document, Exh. P4. Secondly, and perhaps in the alternative, it is argued that, in as much as there was no objection as to the admissibility of any of the extrinsic evidence, part of which was admitted by consent, the court was under duty to take it into account when re-evaluating the evidence, and was entitled to rely on it when making its decision. The court was not asked to, and it could not of its own motion, ignore, let alone expunge the evidence from the record. Thirdly it is submitted for the Respondent that once the Appellant adduced extrinsic evidence to prove lack of consideration, thus contradicting an express stipulation in the document, it opened the way for the Respondent to also rely on extrinsic evidence to prove existence of consideration.

I will summarily dispose of two of the two of the arguments, which, in my view, are rather elementary. First, is the argument for the Appellant that a term implied in a legal mortgage does not have legal effect because it is not expressed in, and therefore registered as part of, the instrument? I do not agree. Where a court properly decides that a term is to be implied in a written contract, the court is not adding a new term but declaring that, though not expressed in the document, such term was in the contemplation of the parties at the time of the execution of the contract, and therefore is part of it. It is deemed to have taken legal effect along with the rest of the terms from the date the document took effect, not from the date the court interprets the document. The second was used to interpret Exh.P4. I think, this too, is untenable. I have said earlier in this judgment that both the Tribunal and the Appeal relied on extrinsic evidence to determine the consideration given by UCB for the mortgage. To say that this was not to interpret Exh.P4 is to construe the word “interpret” in the narrow sense of giving meaning to words in the document. The extrinsic evidence, however, was used to determine the existence of consideration for the mortgage, by inference, and on strength of that, to hold that the mortgage contract was valid. In my view that was interpretation of the mortgage.

The more substantial arguments are those in respect in respect of the law on exclusion of extrinsic evidence in determining the terms of a document. The Appellant relied on ss.90 and 91 of the Evidence Act, in support of the exclusion. In its judgment however the Tribunal expressed the opinion that because of the provisions of ss. 16 and 18 of Statue No. 11 of 1994, the Tribunal was not to be tied down by the provisions of the Evidence Act, so long as it observes the rules of



natural justice. The Court of Appeal upheld that opinion. For my part, I have reservations about that opinion. It does not appear to me that the provisions in Statute No. 11 of 1994 referred to, necessarily exempts proceedings in the Tribunal from application of the Evidence Act. however in both judgments the opinion was not part of the ratio decidendi; and strictly it is not subject of this appeal. I will therefore proceed to consider the issue at hand on the premise that the Evidence Act is applicable to proceedings in the Tribunal.

The substance of s. 90 is that a contract in form of a document, and any other matter required by law to be in form of a document, has to be proved by production of that document itself; and that no extrinsic evidence shall be given in proof of the contents. It seems to me that there is no question of that section having been contravened in the instant case. The mortgage was proved by production of the document itself, namely Exh.P4. I think the core of the contentious issue is whether the admission of the extrinsic evidence and reliance on it contravened s.91 which reads in part:-

***“91. 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 the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representative in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms:***

***Provided that:***

- a) Any fact may be proved which would invalidate any document, or which would entitle any persons to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law;***
- b) .....***
- c) .....***
- d) .....***
- e) .....***

As I have noted, earlier in this judgment, the evidence complained about, as contravening the exclusion rule, is all that evidence which was relied on to draw the inference of consideration. It is the evidence on what were the terms agreed upon for the restructuring and rescheduling arrangement the gist of which is in Exhs, P2 and P3. It is stressed for the Respondent however, that part of the evidence was admitted by consent of both parties, and the other part was adduced through the Appellant's witnesses. It is therefore argued, and I agree, that the Appellant cannot at this stage object to the admission of that evidence. The time to object to admission was at the trial. No objection was raised and it must be taken that the Appellant waived the right to object. Nevertheless, I think the question remains, whether evidence which is admitted by consent or without objection can be the purpose of contradicting, varying, adding to, or subtracting from, a document in issue.

The main rationale behind the exclusion rule in s.91, is, stated in **PHIPSON ON EVIDENCE**, (10<sup>th</sup> Ed. At p.720 paragraph 1782,): to be:

***“that when the parties have deliberately put their agreement into writing it is conclusively presumed ..... that they intend the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith, or treacherous memory.”***

The rule is founded on a presumption that what is written in the contract reflects fully what the parties agreed to be bound by. It se those agreed terms from unwarranted alteration and unnecessary disputes. The presumption, however, is not absolute. Thus the presumption may be rebutted circumstances set out in paragraph (a)-(f) of the proviso to s.91, when extrinsic evidence, which has the effect of contradicting or in some other way altering the import of the document, is permitted. To my mind, it is clear that the proviso is intended to prevent two things, namely (1) the use of the rule to cover up invalidity of a questioned document; and (2) the use of the rule to obscure existing facts and defeat the genuine intention of the parties to the questioned document.

In the instant case the appellant sought to expose the mortgage contract as invalid for lack of consideration. This was through oral evidence of PW1 to the effect that, contrary to the statement in the written mortgage contract. UCB did not lend to the Appellant the shs. 700m/= . Needless to

say, that evidence clearly falls within the parameters of the exception in paragraph (a) of the proviso. The evidence was admissible, and would have been basis for holding the mortgage to be invalid but for the other extrinsic evidence, both oral and documentary, from which the Court of Appeal, (and the Tribunal before it) deduced that UCB did provide other form of consideration. It is that other extrinsic evidence, which the Appellant contends ought not to have been relied on. In the Appellant's written missions, several precedents are cited as authorities in support of hat contention. They are: **Choitram VS Lazar** (1959) EA 157; **Jinabhai & Co. Ltd Vs Eustace Sisal Estates Ltd** (1967) EA 153; **Damodar Jamnadas Vs Noor Valji** (1961) EA 615; **Frith Vs Frith** (1906) AC 254; **Turner Vs Forwood** (1951) All ER 746; and **Pragji Vs Lubega** (1964) EA 659. I will briefly consider all of them.

The decision in **Damondar Jamnas Vs Noor valji** (supra) turns on failure by a party, on whom the burden of proof lay, to produce a note or memorandum for purposes of the Money Lenders Ordinance. It therefore relates more to the prohibition in s.90. than to the provisions of s.91. In my view it is not relevant to the facts in the instant case. Three of the precedents, namely (1) **Frith Vs Frith** (supra), (2) **Turner Vs Forwood** (supra), and (3) **Pragji Vs Lubega** (supra) were apparently cited in support of the position that parol evidence cannot be adduced to contradict the document in issue, because the Appellant maintained that the intrinsic evidence in this case contradicted the mortgage contract provision on consideration. The interpretation issue in each of the three precedents was whether extrinsic evidence showing consideration which was different from that stated in the contract document was admissible. In the first case the Privy Council held that parol evidence of consideration additional to, or more than, that stated in the power of attorney in issue, was admissible. In the second case, where a deed of assignment stated consideration to be 10s, the English Court of Appeal, followed that decision of the Privy Council and held, that oral evidence was admissible to show that the true consideration was Euros 1,215. In the third High Court of Uganda held that parol evidence was admissible to show that the lesser sum of shs. 10,000/= only, had been advanced.

Of the remaining two precedents, in one it was expressly held that the proposed extrinsic evidence was inadmissible; while in the other, doubt was expressed about the admissibility of the extrinsic evidence. The **Choitram Vs Lazar** (supra) the Court of Appeal for East Africa held that the words:

***“Taken over only 181 pieces of various materials .....Not taking over the prices mentioned”***

written on a list of goods, constituted a memorandum under s.6 of the Sale of Goods Ordinance a contract of sale, and were ***“so clear as to render inadmissible any attempt to explain orally”*** that what was meant was to merely taken over possession as agent. In ***Jinabhai & Co. Ltd And Another Vs Eustace Sisal Estates Ltd*** (supra) a clause in a written contract of sale of land provided:

***“The vendor shall not be liable for the broker’s commission (if any)***

The same court concluded that the true interpretation of the clause was that the vendor would not be liable for any commission which the purchaser might have to pay, and did not amount to indemnity, as the vendor claimed in the leading judgment, SPRY J.A, as he then was, said that in arriving at that conclusion, he ignored the (extrinsic) evidence which had been purportedly admitted under the proviso but which he thought was inadmissible. However, he added that even if that evidence was admissible it would not have other words, for what it was worth, the extrinsic evidence did not have the effect of contradicting or varying in any way the written clause.

In my view there is a fundamental difference between these last two precedents and the instant case, and I have no hesitation in distinguishing them. In the two precedents the written words of the contracts were clear and reflected what was in the minds of the parties at the time of making the contract; but what was sought to be implied was not shown to have been in the contemplation of the parties. The reverse is true in the instant case. What is stated in the mortgage contract, on consideration, does not reflect what was in the minds of the parties; but what was inferred from the extrinsic evidence on consideration was an undisputed fact. Neither party to the mortgage contract had harbored any illusion that UCB had in actual fact lent shs. 700m/= to the Appellant as stated in the mortgage contract. But it was a fact that UCB accepted to postpone recovery of the shs. 700m/= debt, subject, inter alia, to the Appellant entering into the mortgage contract. The second distinguishing feature is that in the two precedents the term sought to be implied was inconsistent with, and would have changed the character or nature of the contract as documented. In Choitram’s case a sale of goods contract would have changed into an agency if the term

sought to be implied was accepted: and in *Jinabhai Coy's* case a negative undertaking would have been converted into a positive one of indemnity thus changing the nature of the undertaking. The Court refused such conversions, because doing so would have amounted to unwarranted changes of what the respective parties had agreed upon. In the instant case, however, no such change results from the inference of the real consideration. It remains a mortgage to secure repayment of the shs. 700m/= debt.

I think reference to some excerpts in the precedents cited above helps to appreciate and apply the pertinent principles to the instant case. In *Frith Vs Frith* (supra) the Privy Council, at p. 259 cited with approval the following statement of the law:

***“The rule is, that where there is one consideration stated in the deed, you may prove any other consideration which existed, not in contradiction to the instrument; and it is not in contradiction to the instrument to prove a larger consideration than that which is stated.”***

In *turner Vs Forwood* (supra) at p.749 C-D Singleton L.J. said:

***“In view of those two recitals, I think it is clear that the whole arrangement between the parties is not set forth in the deed. The consideration is stated:***

***“In consideration of the sum of 10s paid by (the first defendant) to (the plaintiff, the plaintiff) doth hereby assign and transfer to the said (first defendant) all that sum of 1, 215 euros now due and owing by the company to (the plaintiff).”***

***Any one looking at the deed would ask at once why the transaction had been carried out. If on the face of a document such as this, it appears that the consideration is no more than nominal, it seems to me that the court is entitled to hear evidence of the true circumstances and the true consideration.”***

And in the same *Denning L.J* as he then was said at p.749 F.

***“The rule excluding parol evidence only applies when the parties set down in writing the terms agreed.”***

In *Jinabhai & Co Ltd Vs Eustace Sisal Estates Ltd* (supra) at p.160 Spry J.A. stated the general rule of exclusion thus:

***“It is a general rule of interpretation that where is no express provision in a contract, the court will not imply any provision relating to the same subject matter....”***

I pause here to point out that there seems to be a misprint in that sentence as it appears in the law report. Clearly the word “no” is misplaced. I think the original word was “an” so that the affected part of the sentence should read: ***“where there is an express provision in a contract the court will not imply any provision relating to the same subject matter.”*** This is borne out by what follows in the judgment, which continues thus:

***“It is a general rule of interpretation that where there is no express provision in a contract, the court will not imply any provision in a contract, the court will not imply any provision relating to the same subject matter....”***

I pause here to point out that there seems to be a misprint in that sentence as it appears in the law report. Clearly the word “no” is misplaced. I think the original word was “an” so that the affected part of the sentence should read: “where there is an express provision in a contract the court will not imply any provision relating to the same subject matter.” This is borne out by what follows in the judgment, which continues thus:

***“One authority for this proposition is Mills Vs United Countries Bank Ltd., in which Fletcher Moulton L.J said:-***

***“When I find a deed which fully expresses the contract between the parties I decline to add anything by way of an implied contract. I think it is quite clear that the parties here .... Had the whole matter before them and that if this indemnity had been intended we should have found it expressed in the deed, and if they did not intend that the implied covenant of indemnity should exist between them, then we are bound not to read it into this deed.”***

***..... Nothing would have been easier or more natural than for the parties to have inserted a positive undertaking on the part of the purchaser, yet with the matter of commission very much in mind, they did not do so. On those circumstances it is not, in***

***my opinion, open to a court to interpret the negative provision as a positive one; to do so is, in my opinion, to imply a term in the contract which the parties did not think fit to include....”***

I think, what Sir Charles Newbold P. said in the minority judgment in the same case, though not applicable to the facts of that case, is a sound principle with which I agree and is very apt in regard to the facts of this case. He said at p. 156 F-H

***“The time..... is long past since the courts have been precluded from giving effect to the intention of the parties by reason of the failure to use any particular form of words ..... whatever may be the form of words, once the intention of the parties can be ascertained, the courts will give effect to that intention unless the words used cannot possibly bear that meaning. Further, if the words used are on the face of them meaningless in relation to the surrounding circumstances in which they were used, then, if the court is satisfied that the words used were intended to give effect to an agreement between the parties, the court will not discard the words as meaningless or complete surplusage but will construe them in such manner as to give effect to the intention of the parties; and in order to ascertain that intention the parties; and in order to ascertain that intention the court will have regard to the surrounding circumstances.”***

Upon applying the principles underlying the decisions in those precedents, I find that the extrinsic evidence was correctly relied upon in the instant case. Admittedly, it does not appear on the face of the mortgage document, as it did in **TURNER’S** case (supra), that the stated consideration was nominal, nor did it so appear that what was agreed upon was not all set down in the document. However, upon introduction of credible evidence showing that the shs. 700m/= was not lent to the Appellant but was a debt inherited from General Parts, the position changed. A question similar to that expressed in the Turner’s case (supra) was provoked: why did the Appellant inherit the debt and enter into the mortgage contract? The answer was not in Exh. P4. By parity of reasoning, I find that the Tribunal was entitled to hear evidence of the true circumstances and the true consideration and that was the extrinsic evidence particularly in Exhs. P2 and P3. Secondly, I think that having regard to the ample evidence regarding the parties’ agreement on the restructuring and rescheduling arrangement, the words used to describe the

consideration in the mortgage document were so unreal or meaningless in relation to the factual context that the court ought to construe them in a manner that gives effect to the intention of the parties. As noted earlier in this judgment the Tribunal ascribed the misdescription to the fact that in the interactions among the parties prior to the making of the mortgage document, portion of the debt of shs. 700m/= had come to be known as a loan to the Appellant. I may add that the use of the standard form facilitated the misdescription. Seen in that context it becomes evident that the way to give effect to the intention of the parties in the parties in the instant case is not to discard the mortgage as invalid for lack of consideration, but to take the extrinsic evidence into account to ascertain what the real consideration for the mortgage was. That is what both the Tribunal and the Court of Appeal did. I am of course mindful of the important principle of interpretation of documents to the effect that what matters is not what the intention of the parties was but what the words they used mean. In my opinion however this must be qualified to the extent that it cannot apply where the words used are as in the instant case, meaningless in relation to the transaction in question.

Lastly I do not accept the contention for the Appellant that the inference of forbearance as the consideration for the mortgage for the mortgage, contradicts the mortgage contract. Obviously forbearance as a consideration is different from, consideration of a loan. However, as I have said the character of the instrument remains the same, namely a mortgage security for repayment of shs. 700m/= debt.

In conclusion my opinion is that neither the Court of Appeal nor the Tribunal erred in relying in Exhs. P2, P3 and any other extrinsic evidence to discover and determine the true consideration provided by UCB for the mortgage. I would therefore hold that grounds 1,2,3, and 4 ought to fail.

I now turn to the second set of grounds of appeal under the issue: whether there was insufficient evidence in proof of forbearance as consideration provided by UCB. The contention for the Appellant is that there was not sufficient evidence of forbearance on the part of UCB to give General Parts relief in repayment of its debts. In a nutshell the argument is to the following effect. Although there was evidence that the debt was split into two, namely short – term and long-term loans, there was no evidence to show that UCB did in fact forbear recovery of the debt. On the contrary there was evidence which was uncontroverted was that (1) General Parts



continued to incur interest on the whole debt including the portions of shs. 700m/= transferred to the Appellant; and (2) before installment repayment by the Appellant of that portion was due to start on 1.12.93, UCB filed suit in the High Court on 23.9.93 against General Parts for recovery of shs. 3.4b/= which included the shs 700m/= portion that there was subject matter of the mortgage contract. In addition the appellant complains that the Tribunal erred in the exercise of its discretion when it rejected an application under 0.12 r.6 of the Civil Procedure Rules for an order to call for the High Court record of the said suit UCB filed against General Parts, (i.e. HCCS No. 386/93). And similarly the Court of Appeal is criticized for “shutting out” that same court record. It is claimed that that record would have shown that “**the rescheduling arrangement had collapsed, and accordingly even the liability on the appellant had ceased, and the loan reverted to General Parts**”. The Appellant contends that a grave miscarriage of justice has been occasioned as a result of the error and misdirection on the part and the Court of Appeal. According to the Appellant the shs. 700m/= “**has to be repaid twice by both General Parts and the Appellant,**” and this amounts to abuse of the court process. The Appellant therefore asks that, notwithstanding that under r. 29 of the Rules of the court this Court has no discretion to take additional evidence, it should invoke its inherent powers under r. 1(3) of the same Rules, to take note of the judgment in the High Court suit in order to make orders necessary for achieving the ends of justice and prevent abuse of the court process. The orders necessary to achieve that however, are not indicated, and the Appellant’s prayer remains for judgment to be entered as prayed in the original suit.

For the Respondent it is submitted that although forbearance, as consideration, was not expressed, there was sufficient evidence from which it was properly inferred. With regard to the record of the suit in the High Court, the Respondent contends that neither the Tribunal nor the Court of Appeal can be faulted. The Tribunal exercised its discretion under 0.12 r.6 properly and it was so held on appeal. There was no application to admit the record as additional evidence on appeal and so the Court of Appeal cannot be accused of shutting it out. In the circumstances, since that record is not part of the evidence in this case it cannot be relied upon to challenge the evidence from which forbearance was deduced. The Respondent in turn protests against the Appellant’s Advocates having sought to “smuggle evidence to this court. This is a reference to the fact that a copy of the High Court judgment in the said suit of UCB against General Parts was annexed to the Appellant’s written submissions, along with copies of the cited authorities.

Before dealing with the pion in this second issue. I should briefly comment on the Respondent's protest against the purported smuggling of evidence, the appellant's proffered excuse for it, and an apparent new issue raised. There is no doubt in my mind that it is improper for a party to seek or attempt to influence the decision of an appellate court with evidence which was neither properly adduced and admitted during proceedings in the lower court nor properly received by order of that appellate court as additional evidence. This court has no jurisdiction to take additional evidence as conceded for the Appellant. The Appellant's suggestion that this court invokes inherent powers to do so, is untenable because the court cannot use a general power set out in one rule to do what is specifically forbidden in another rule. For that reason, the High Court judgment in HCCS No.386/93 cannot be taken into account in this appeal. In any case, I am of the view that, the judgment would not have enhanced the Appellant's case any further than the oral evidence did. If the intention was to show lack of forbearance because of the fact that UCB sued General Parts for recovery of the shs. 700m/=, that fact was established by the uncontradicted oral evidence of PW1. It seems to me, however, that the real purpose for drawing attention to the said High Court judgment is to lay foundation for what is termed abuse of court process resulting in miscarriage of justice, on the ground that, according to the appellant's submissions, the same debt of shs. 700m/= "**has to be repaid twice by both General Parts and the Appellant.**" With due respect, I think that that purpose is as unacceptable as the premise is fallacious. In my view there is no abuse of court process nor any miscarriage of justice that has been occasioned. Without going into detail of the background it should suffice to say that the essence of the judgment of the Tribunal, in the instant case, was to decline to make the declaratory orders prayed for. That is what the Court of Appeal upheld. There is no order, in the instant case, for repayment of the debt.

Needless to say, if that debt is actually paid by one or the other, in one way or another, there are other legal means to resist and prevent any attempt to recover it a second time. And this leads to yet another point introduced by the Appellant under this issue. It is contended that the Appellant's liability ceased and the debt of shs. 700m/= reverted to General Parts upon the so called collapse of the restructuring and rescheduling arrangement. This contention is tantamount to a defence of discharge. It was neither pleaded nor canvassed at the trial. The appellant took out the action claiming that it was not indebted because the mortgage contract was void for lack of consideration. It could have pleaded in the alternative, for what it was worth, that its liability

was discharged when the restructuring and rescheduling arrangement allegedly collapse. The Tribunal and the Court of Appeal would have considered and determined that as a separate issue. That did not happen. In my view, the Appellant cannot raise that new issue on a second appeal. That leaves the central question, whether there was sufficient evidence before the Tribunal to prove forbearance as consideration for the mortgage. There is no dispute on the evidence. The appellant's contention in this regard is on two legs. The first leg, appearing, in a written submissions after a summary of the undisputed evidence is put thus:

***“2.7 First and foremost it should be noted that all the above evidence relied on by the Tribunal only showed that the parties had agreed to reschedule the General Parts (U) Ltd loan. And indeed thing of the loan through the split. But forbearance as an act was not shown.”***

As I have stated earlier in this judgment, forbearance was a fact deduced from the proved facts; and this a court can properly do. It has long been established that even in absence of a creditor's express promise to forbear from enforcing measures for recovery of the debt, that forbearance is good consideration for the third party's promise to repay the debt. See ***Creari Vs Hunter*** (1887)19 QBD 341. In the instant case, it was proved and it is not in dispute that the Appellant participated; with General Parts, in requesting UCB that General parts' huge debt be restructured and its repayment be rescheduled. UCB accepted the request subject to diverse terms and conditions being met. The position is clearly put in Exh. P2, being a letter written by UCB to General Parts' Advocates on 14<sup>th</sup> June 1991. It reads in part:

***“We refer to your letter of 22<sup>nd</sup> April 1991 and the audience your clients had with the board of directors of the Bank on 22<sup>nd</sup> May 1991 on the state of their account and are pleased to advise that subject to the terms and conditions stipulated here-in-below, the Board has approved the restructuring and rescheduling of their facility .....*”**

After setting out the approved restructured and rescheduling and the terms and conditions, the letter reads further:-

***“Your client should be advised that if they fail to fulfill any of the above terms and conditions the Bank will have no option but to auction their property without any further notice.”***

The terms and conditions were accepted. One of them was that the Appellant takes over part of the debt and provide security for its repayment. The Appellant entered into the mortgage contract with UCB. The latter refrained from auctioning General Parts' property. That is what amounted to good considerations for the mortgage as held by the Court of Appeal.

The second leg of the Appellant contention appears to be that upon the UCB taking out a suit High Court against General Parts for recovery of the total debt, including the shs.700m/=, forbearance and therefore consideration for the mortgage, lapsed. In the Appellant's written submission, after reference to the error in the judgment of the Court of Appeal on the date on which the repayment of the shs.700m/= was due to commence, it is submitted:

***“2.6..... if the Court of Appeal was alive to the above date of repayment (i.e. 1.12.93) as constituting relief and therefore forbearance, then it ought to have come to a different conclusion, as before the date of repayment, upon a purported breach of the rescheduling arrangement by General Parts through the institution of HCCS No.386 of 1993.”***

I do not agree. I find nothing in the judgments of the Court of Appeal indicating that the Court error (on the date when repayment of shs.700m/= was due to start in any way influenced the Court's holding that UCB did forbear from recovering the shs. 700m/= in consideration of the mortgage. The fact the UCB filed suit in September 1993 with a view to recover the amount from General Parts does not wipe away the fact that for two years at the very least, UCB had refrained from recovering from the debt. In my view, that suit did not invalidate the mortgage contract.

For the reasons I have outlined in this judgment, I think grounds 5,6,7,8 and 9 must also fail. In the result I would dismiss the appeal with costs and would give certificate for two counsel in this court.

Dated at Mombasa this 12<sup>th</sup> day of January 1999.

**J.N. MULENGA**

**JUSTICE OF THE SUPREME COURT.**