THE REPUBLIC OF UGANDA IN THE SUPREME COURT OF UGANDA AT MENGO (CORAM: ODER, TSEKOOKO, MULENGA, KANYEIHAMBA AND MUKASA-KIKONYOGO JJ. S. C)

CIVIL APPEAL NO.5 OF 1999

BETWEEN

GENERAL PARTS (U) LIMITED…… APPELLANT

AND

NON PERFORMING ASSETS RECOVERY TRUST……... RESPONDENT

(Appeal from the decision of the Court of Appeal (Okello, Engwau and Twinomujuni JJ.A) at Kampala dated 14th May, 1999, in Civil Appeal No. 20 of 1998).

JUDGMENT OF MULENGA JSC.

This is a second appeal emanating from a suit in the High Court in which Uganda Commercial Bank, to which I shall herein refer as "UCB", sued General Parts (U) Ltd. to which I shall herein refer as "the appellant", in connection with the appellant's heavy indebtedness to UCB. In the suit UCB sought inter alia, a declaratory judgment that it had properly appointed a Receiver/Manager, that the Receiver/Manager do execute powers conferred upon it by UCB, and an order that the appellant pays to UCB the debt owing from the former to the latter, in the sum of Shs. 2,288,821,473/=. Before conclusion of the trial in the High Court, the Non-Performing Assets Recovery Assets Trust, to which I shall herein refer as 'the respondent', was joined to the suit as co-plaintiff, on the ground that UCB had assigned the said debt to it, under the provisions of the Non-Performing Assets Recovery Statute. In the end the High Court granted the declaration prayed for that the Receiver /Manager was properly appointed and will go ahead to execute the power conferred on it. The appellant's appeal to the Court of Appeal, which was against the respondent alone was dismissed hence the appeal to this Court.

This case has an involved background, but the facts material to this appeal can be stated simply. in or around 1990 the appellant obtained overdraft facility from UCB. As security for the facility the appellant executed a debenture creating a floating charge over its property, in favor of UCB. Subsequently because the appellant had difficulties in servicing the overdraft it made proposals to the bank which would lessen its burden. The proposals which centred on restructuring the indebtedness into two components of what were called short- term and long term loans, were discussed at a meeting between UCB's Board of Directors and the appellant's Managing Director Haruna Semakula DW 1, accompanied by its lawyer. Later UCB wrote to the appellant intimating that the board had approved the proposal subject to terms and conditions specified in the letter. After an exchange of correspondence to refine the agreed structure and the new repayment schedule, the appellant accepted the terms and conditions, in writing. One of those was that the appellant was to provide additional security in form of a mortgage of diverse plots of land. The mortgage of the of plots of land, some of which belonged to the appellant and others to its Managing Director, was made and signed on 12-8-9 1. Although the appellant had requested for further funding, this did not feature in what the bank approved in writing which became in essence, the restructuring and rescheduling agreement. The appellant continued to fail to service the loan.

On 21.7.92, UCB, in exercise of its power under the debenture deed, appointed Messrs Key Agencies & Auctioneers, in writing, to be Receiver/Manager of the assets and property of the appellant. On the same day, by separate letter, UCB instructed the same firm to take possession of, and sell by auction, the appellant's diverse assets charged under the debenture, and if the proceeds of sale did not liquidate the debt, to similarly sell the mortgaged land. When the said firm attempted to take possession of the property pursuant to the said appointment and instructions, the appellant resisted by chasing the firm away from its premises and even suing it for trespass. Faced with that resistance UCB went to court seeking the declaratory judgment that its action was within its contractual and legal rights.

The appeal to this Court is on seven grounds. The first and second grounds relate to a dispute on what the appellant agreed with UCB in the process of restructuring the debt. Grounds 3, 4 and 5 relate to the application of provisions of the debenture deed on the appointment of the Receiver/Manager. Grounds 6 and 7 relate to the mortgage.

Dr. Byamugisha counsel for the appellant opted to argue ground 6 first. It reads:-.

"6. The learned Judges erred in law in holding that
a) the validity of the mortgage was not an issue or, at the very least, in issue at the trial of the case in the High Court, and that the Mortgage Deed was properly executed by the registered proprietor; and b) in introducing and basing their decision on a new matter of the power of attorney, which was never in evidence or in issue in the High Court or the Court of Appeal."

Counsel submitted that the validity of the mortgage was made an issue at the trial in the High Court under the agreed issue no.8 which was: what are the remedies available to the (aggrieved) party? He pointed out that the two courts below had held that the Receiver/Manager was appointed under both the debenture and the mortgage. He submitted that therefore, in order for the court to hold that the respondent was entitled to the remedy of appointing a receiver, the mortgage had to be valid. He also pointed out that he had raised the issue both in his written submissions to the High Court, and in the oral submission to the Court of Appeal. He criticized the learned trial Judge for failing to address the issue in his judgment; and criticized the Court of Appeal for basing its answer to the issue, according to the judgment of Okello J.A. on the contents of a power of attorney which was not in evidence. Counsel maintained that the mortgage was invalid because it was not executed in accordance with provisions of the Registration of Titles Act.

In reply, Mr. Nkurunziza, counsel for the respondent, made three submissions. First he pointed out that the Receiver/Manager was appointed not under the mortgage, but under the debenture, and that this was consistently pleaded in the plaint and the amended plaint. Secondly, while conceding that there was some irregularity in the execution of the mortgage, he submitted that the mortgage was valid. He argued that from the evidence of Haruna Semakula, DW 1, that UCB had required the appellant to produce a power of attorney, it was open to the court to infer that the mortgage was to be executed by a person other than the registered proprietor. He, therefore, maintained that the conceded irregularity in the manner the mortgage was executed, did not go to the substance of the document, and so did not invalidate it, citing *Govidji Popatal v. Nathoo Visandji (1960) E.A.361 (CA): (1962) E.A.377 (PC)* as authority for the proposition. Thirdly, counsel submitted that it was too late for the appellant to rely on the irregularity in the execution of the mortgage, because it had not been pleaded as a defence.

In ground 6(a) a subtle distinction is made between the expressions “an issue” and “in issue”. Although counsel did not elaborate, it seems to me that the former signifies one of the agreed and formal issues, framed from pleadings, while the latter covers any issue that comes into controversy in the course of the trial. Clearly, in the instant case, validity of the mortgage was not an issue among those framed from the pleadings at the start of the trial. In my view it is not even implicit in issue no.8 as submitted by counsel for the appellant. Issue no.8, like all the other framed issues, was framed on basis of the pleadings as at commencement of the trial. Validity of the mortgage however did not feature in any pleading. The following are the pertinent pleadings. In the amended plaint, it was pleaded:

“5. The facts constituting the cause of action are as follows:

a) *That the 1st Plaintiff extended loan facilities to the Defendant which the defendant secured by executing a Debenture in favor of the1st Plaintiff there by creating a floating charge over all assets, goodwill and property whatsoever and also with mortgages of several properties*

b) *That under the Debenture, it is specifically provided that in the case of the Defendant defaulting in payment, the Plaintiff was free to appoint a Receiver/Manager of the Defendant company property at anytime after the principal monies secured become payable*

c) *That the monies secured became payable and the Plaintiff duly demanded for the same from the Defendant who refused and or failed to comply with the demand note*

d) that the1st Plaintiff in strict conformity with provisions of the said Debenture appointed MIS Key Agencies and Auctioneers, Receiver/Manager of the Defendant assets and properties

e) ……..

The amended plaint was concluded with, inter alia, prayers for:

a) a declaratory judgment that the 1 Plaintiff properly appointed a Receiver/Manager.

b) the Receiver/Manager do execute power conferred upon them by the Plaintiff”

The appellant's pleading in its written statement of defence was, inter alia, that the suit was premature, that the UCB had breached an agreement for rescheduling the loan, and that the loan monies had not become payable.

Given those pleadings, it is obvious that in order for the court to resolve whether or not the Receiver was properly appointed, it did not have to consider the validity of the mortgage. which mortgage was neither invoked in the appointment, nor pleaded in the plaint, save for the oblique reference to "mortgages' in paragraph *5(a)* reproduced earlier in this judgment. It seems to me, that it is for that reason that the learned trial Judge ignored the issue, and the Court of Appeal held in the leading judgment of Engwau J.A. that validity of the mortgage was not an issue at the trial, with which holding, I would respectfully agree. That notwithstanding, however, the learned Justice of Appeal after noting that the issue had been raised in the written submissions of counsel for the defendant to the trial court, proceeded to consider it. On the basis of the evidence of Haruna Semakula, the learned Justice of Appeal came to the conclusion, that the mortgage was properly executed. With due respect, I find it difficult to agree with that conclusion, and although I am of the view that the issue was not very material to the suit as presented, I am constrained to express my views on it, because of the impact that conclusion is likely to have on the issue of execution of documents generally.

At the outset I should say that I disagree with Mr. Nkurunziza's submission to the extent he suggests that the appellant is precluded from raising the issue at this stage because it was not raised as a defence at the trial. Much as I agree that it was not pleaded, and was not among the issues framed formally for determination, I think it was sufficiently raised to warrant an answer. It was not only raised in counsel's written submissions to the trial court, but also through cross-examination of Alfred Oder, PW2, when it was shown that the execution of the mortgage document was questionable. It was also sufficiently raised on appeal that it led to the holding, which is subject of complaint in this appeal. In coming to the conclusion that the mortgage was valid, the learned Justice of Appeal had this to say

"*I agree again with Mr. Nkurunziza that Haruna Semakula, DWI, did not deny signing the mortgage, nor did he deny executing the power of attorney. In fact, he executed both documents as the Managing Director of the appellant company. In either case, the*

properties and securities under the mortgage became the properties of the appellant company. Consequently, the appellant company executed the mortgage (as) the donee of the power of attorney which was executed by Haruna Semakula. The authority of General Industries (U) Ltd. (supra) relied upon by Dr. Byamugisha is irrelevant on the ground that the mortgage document was executed by the registered proprietor. Consequently, it is a valid mortgage "

In my view, the appellant is entitled even at this stage, to challenge that holding. Unfortunately there is ambiguity in that holding as to who was held to have executed the mortgage as mortgagor. On the one hand, the learned Justice of Appeal appears to hold that it was the appellant company as donee of a power of attorney, acting through its Managing Director. On the other hand he appears to hold that it was the registered proprietor without indicating which one, when it was on record that some of the property belonged to Haruna Semakula, and others to the appellant company. However, the ambiguity seems to be cleared by the supporting judgment of Okello J.A., in the following passage. After summarising the submissions of Dr. Byamugisha, and observing that he had overlooked important points in the evidence, i.e. that Semakula had admitted to have executed the power of attorney and to have signed the mortgage, Okello J.A. said:

"Clearly the above evidence has adverse effect on the submission of Dr. Byamugisha. The effect of the power of attorney is that the donor thereof has transferred his power to mortgage his registered properties referred to in the power of attorney, to the donee. The donee would do so on behalf of the donor. Haruna DW1 admitted that he executed a power of attorney. He also admitted to have signed the mortgage document on 28.8.91. He must have done so as an official of the appellant company in whose favor the power of attorney was executed. The appellant company therefore executed the mortgage document as donee of the power of attorney executed by Haruna Semakula "

The learned Justice of Appeal then noted, that observations on a similar mortgage document in *General Industries (U) Ltd. v. NPART Civil Appeal No.5 of 1998* (unreported) were obiter. Finally he also concluded that the mortgage document was properly executed and consequently is valid. It is a common holding in the two judgments that the mortgage was executed by the appellant, being donee of a power of attorney, and that the execution was effected by Haruna, its official, signing the document on its behalf. From the foregoing, it is evident that Dr. Byamugisha's criticism that the court acted on a document which was not in

evidence, has merit. Haruna Semakula who spoke of it, neither produced it, nor testified on its purport, let alone on its contents. The court's conclusion is solely based on assumptions as to the contents of the power of attorney. Obviously that deficiency is significant to the question whether it was proved that the appellant had power to execute the mortgage. To my mind, however, the primary question that needs be considered is whether on the face of it, the mortgage document appears to have been executed by the appellant.

The Companies Act, (Cap.85), provides in s.34 that in law, a contract required to be in writing, may be made on behalf of a company in writing signed by any person acting under its express or implied authority. Counsel for the respondent did not directly seek to rely on that provision, though he included in the authorities he relied on, the decision of the Court of Appeal for East Africa in *Lwajagali Coffee Growers Ltd. v. Leslie and Anderson (EA) Ltd., and Others (1967) 1 ALR* COMM 323 in which Newbold P. said:

"The stern rule of law that generally contracts should be by deed under seal was gradually eroded especially in relation to what we call commercial corporations. For over 100 years it has been accepted that commercial companies do not normally need to act under or by virtue of a deed. No distinction in common law has been made between an instrument writing not under seal and any other form of authority. In other words a commercial company can, unless there is statutory provision to the contrary, contract validly, whether the contract is created by word of mouth or by writing". (emphasis is added).

The Registration of Titles Act, RTA, (Cap.205), makes several provisions regarding execution of documents affecting land. It also provides specifically, in section 3 thereof, that any provision of an Act or rule inconsistent with its provisions, shall not apply to land which is under its operation. It follows, therefore, that the provisions of the RTA regarding execution of documents affecting land under its operation, prevail over any provision of the Companies Act which is inconsistent with them. The following sections of the RTA are pertinent in this connection:

Section 114 provides:

"*The proprietor of any land under the operation of this Act may mortgage the same by signing a mortgage thereof in the form in the Eleventh Schedule to this Act* ".

Section 154, so far as is relevant, provides:

"a) *The proprietor of any land under the operation of this Act may appoint any person to act for him in dealing therewith by signing a power of attorney in the form in the Sixteenth Schedule to this Act. Every such power shall be registered in accordance with the provision of the Registration of Documents Act.……*

Section 156, so far as is relevant here, provides:

"No instrument or power of attorney shall be deemed to be duly executed unless either;

a) The signature of each party thereto is in Latin character; or

b) a translation into Latin character of the signature of any party whose signature is not in Latin character

and the name of any party who has affixed a mark instead of signing his name are added thereto by or in the presence of the attesting witness.……

And Section 141, so far as is relevant here, provides:

"A corporation, for the purpose of…….. dealing with any land under the operation of this Act or any lease or mortgage, may, in lieu of signing the instrument for such purpose required, affix thereto its common seal.……..

To my understanding, the effect of these provisions, as far as the instant case is concerned, is that for the appellant to duly execute the mortgage document as mortgagor, whether in the capacity of registered proprietor or of donee of power of attorney, it had to either affix its common seal to the document or to act by its attorney or attorneys, appointed for the purpose, signing the document in the manner prescribed in section 156 set out above.

The mortgage document was produced in evidence as Exh.P9. On the face of it, it is a mortgage wherein Haruna Semakula and the appellant, both recited therein, as registered proprietors of the lands listed, mortgaged the lands to UCB. However, the appellant did not affix its common seal to the document, nor did any one, appointed as its attorney, sign the document on its behalf. What appears at the foot of the document, in the space provided for execution by the mortgagor, are two scribbled signatures, with the word 'director' written under one of them, and the word 'secretary' written under the other. The names of the signatories are not added. Even if it be assumed from the evidence of Haruna Semakula, that

one of the signatures is his, and that the second one is of another official of the appellant, there is no evidence to show that they, or either of them, signed as the appellant's attorneys or attorney appointed for purposes of the Registration of Titles Act. The mortgage, therefore, is defective in two respects. The signatories did not only fail to comply with the requirements of section *156* of the RTA, but also, they did not sign by virtue of any registered power of attorney pursuant to section 154(1) of the Act.

Needless to repeat, as was held by the Court of Appeal. that Haruna Semakula did not sign the document in his personal capacity as registered proprietor and that in any event his assumed signature offends section *156* of RTA. Consequently, notwithstanding Haruna Semakula's admission, the signature(s) did not constitute execution by the recited registered proprietors or either of them. In my view, this was not, a mere irregular execution of the document, as

In my opinion, that observation does not lay down a rule of general application on the manner of rebutting the presumption. It has to be construed in the context of the facts of that case, where the instrument was pleaded as of necessity, being the basis of the case. Where, however, by the nature of the pleadings, as in the instant case, it is not called for to plead "lack of due execution" of the document, such pleading cannot be insisted on as a condition precedent to rebutting the presumption.

In view of all the foregoing, I would hold that the mortgage document was not validly executed by the registered proprietor(s)/mortgagor(s), and that the Court of Appeal erred in holding that it was properly executed. Ground 6 therefore ought to succeed.

Ground 7 reads thus:

"the learned Judges erred in law in deciding that the notice provided (for) by section 115 of the Registration of Titles Act was not mandatory and that non-compliance with it was not fatal ".

Section 115 of the RTA provides, inter alia, that where default occurs in the payment of principal or interest secured by a mortgage, and the default continues for one month, the mortgagee may serve on the mortgagor notice in writing to pay the money owing on the

mortgage. The Court of Appeal held that the provision for notice in that section is not mandatory, but that in the instant case, UCB had complied with it because it had given to the appellant, two written notices, namely Exhs. P7 and P8, and that consequently, the appointment of a receiver under the mortgage was proper. With due respect, I do not think that there is any linkage between appointment of a receiver and that section. I will deal with the substance of Exhs.P7 and P8 later in this judgment. Suffice here to say, that in my view, they do not constitute notices for purposes of section 115 of the RTA. Secondly, as I observed earlier in this judgment, the appointment of the receiver/manager was expressly and clearly made under the debenture, not under the mortgage. Thirdly, the provision for notice under section 115 is a prerequisite to the exercise of the mortgagee's power of sale, rather than the power of appointing a receiver. Similarly, that section has no relevance to the exercise of the powers conferred on the receiver. In my considered opinion, therefore ground 7, and the holding complained of therein, are not material to this appeal. I need not say any more on it .

Submitted by Mr. Nkurunziza. It was a failure of execution on the part of the registered proprietor(s)/mortgagor(s). It is pertinent to contrast this with the execution of the same document by UCB as mortgagee. UCB executed by its two named attorneys appointed under registered powers of attorney, signing the document expressly as such. UCB therefore ought to have known that the document was not duly executed by the other party.

The mortgage document Exh. P9, bears endorsements indicating that it was registered under the RTA, as Instrument No.KLA 148924. Ordinarily, that would have raised a presumption that it was duly executed and valid. In my opinion, however, that presumption is rebutted by the clear evidence from the document itself that it was not executed by the registered proprietor(s) as required by law.

The instant case, in my view is clearly distinguishable from *Govindji Popatlal* case (supra) relied on by Mr. Nkurunziza. Whereas in the instant case the contentious issue is whether the mortgage document was in fact executed by the registered proprietor(s), in the *Govindji Popatlal* appeal the main issue was the effect of non-compliance with a statutory provision on proof of execution of a document. In that appeal the appellant contended that execution of the instrument of charge on which the respondents claim was founded, had not been proved in the trial court in the manner prescribed by the applicable statute, namely by calling at least one attesting witness for the purpose of proving execution of the instrument. The substantial

distinguishing feature is that in that appeal the Court of Appeal for East Africa found as an undisputed fact, that the instrument of charge appeared

"On the face of it to have been executed by the parties to it, and their signatures appear to have been attested by two witnesses……..…..."

The Court held, and this was subsequently upheld by the Privy Council, that the said statutory provision, on the manner of proving execution of a document, was overridden by conflicting provisions of the Registration of Titles Ordinance, whose effect was that the registration of a mortgage or charge shall be accepted by courts, as conclusive of its validity. The Court, however, continued to say;

"While registration does not afford irrebuttable proof of due execution, it raises a presumption which can only be rebutted V *lack of due execution is specifically pleaded and proved within the framework of the Ordinance."*

The next grounds argued by counsel for the appellant, were grounds 3 and 4 which read as follows:

"3. The learned Judges erred in law in deciding that Uganda Commercial Bank unconditionally or effectively demanded payment before appointment of the receiver/ manager under the Debenture Deed and auctioneers under the Mortgage Deed.

4. The learned Judges erred in law in deciding that under the Debenture Deed, Uganda Commercial Bank;

a) was justified in appointing the receiver/ manager

b) properly appointed the receiver/manager."

. The core argument by counsel for the appellant on these two grounds runs as follows: Under clause 7 of the debenture deed, UCB could appoint a receiver and manager only after making a lawful demand for payment of the debt. No such demand was made prior to the appointment of Messrs Key Agencies & Auctioneers as receiver/manager. The letters Exh.P7 dated 1.7.91 and Exh.P8 dated 1.10.91, which the Court of Appeal held to be demand notes, were in law not lawful demands for purposes of clause (7) of the debenture deed. Counsel maintained that according to the evidence, even UCB had not treated the letters as demand

notes. He pointed out that evidence indicated that UCB made the decision to enforce the security on 25.6.92, well after those letters had been written. Demand for payment should have been made then but none was made. Counsel submitted that a lawful demand must be, of a pre-emptory character, unequivocal and unconditional. It also must be a demand for all moneys owing not for installments in arrears. In support of his arguments, he relied on **Paget's Law of** Banking, **11th** Ed., Butterworth's 1989 and the precedents cited therein; *Uganda Credit and Savings Bank v. Erivazali Senkuba* (1966) EA 500; *Moore v. Ullcoats Mining Co. Ltd.* (1908)1 Ch.575; *Evans v. Davis* (1878) 10 Ch. D. 747; and *Re Edwards; Williams v. French* (1891) LXV LT 453.

In his reply to this argument, Mr. Nkurunziza did not allude to Exh.P7. He however, submitted that the letter dated 1. 10.91, Exh.P8, amounted to a lawful demand for purposes of clause (7) of the debenture deed. He argued that a lawful demand is made when any outstanding amount for principal, not necessarily the whole loan, is demanded. Secondly, he submitted that such a demand can validly be made before a decision to appoint a receiver is taken. In the premises, he contended that although in Exh.P8, UCB did not demand payment of the whole loan owed, it demanded for the amount outstanding and due. According to him, that was a lawful demand envisaged in clause (7) of the debenture deed. He stressed that the demand was unconditional, albeit polite. As for the UCB board decision having been taken on *25.6.92,* counsel submitted that the decision was a necessary follow up, after the appellant failed to respond to the lawful demand. There was no legal requirement for UCB to make another demand.

Neither counsel addressed the Court directly on the issue to which ground 4(a) relates. In the Court of Appeal the issue was answered in the leading judgment of Engwau J.A., in the following two sentences:
"By failing to make payment of the stipulated installments, the appellant has committed a breach of the rescheduling agreement. In the circumstances, the Bank was just if led to appoint a receiver ".

I would agree with that answer. By agreement between both parties, appointment of a receiver and manager was a remedy that UCB was entitled to resort to, in case the appellant company defaulted in the repayment arrangement. It is not seriously disputed that the appellant company defaulted. It follows, therefore, that subject to fulfilling the agreed

conditions, UCB was entitled to resort to that remedy, and was therefore, contractually justified to do so.

In the same judgment, it was held:
"The Bank in strict conformity with the clauses of the Debenture Deed, appointed M/S Key Agencies and Auctioneers on 21/7/92 as a receiver of the Appellant's assets and properties ".

It is that holding that is targeted in grounds 3 and 4(b).
Although in the letter of appointment of the receiver, which was produced in evidence as Exh. Dl 0, reference is made two debenture deeds, only one dated 12 July, 1990, and titled "SUPPLLMENTARY DEBENTURE" was produced in evidence as Exh.D6. By that deed, it is provided that the appellant:

undertakes that it will ON DEMAND in writing made to it by the Bank pay to the Bank the balance which on account current of the Company with the Bank shall be for the time being owing.…….".

By the same deed, in clause (1), the appellant charges ALL its undertaking, goodwill, assets and property, both present and future, with payment and discharge of all money is intended to be secured by that debenture deed. And in clause (7) it is provided that:

"At any time after the principal moneys hereby secured become payable, either as a result of lawful demand being made by the Bank or under the provisions of clause (6) hereof the Bank may appoint by writing any person to be a receiver and manager of the property here by charged or any part thereof and may in like manner from time to time remove any receiver and manager so appointed and appoint another in his stead".

Clause (6) of the deed sets out several circumstances the occurrence of which would make the moneys secured "*immediately payable without demand".* Since none of those circumstances occurred in the instant case, however, the appointment of the receiver/manager, could have been made under that clause, only *after the principal moneys secured became payable as a result of lawful demand being made by UCB.* I should point out here that, contrary to what seems to have been the view of the trial Court, failure in payment of any instalment due, per se, would not make the whole debt become due. It was not so provided under the debenture. Only lawful demand and the circumstances enumerated under

clause (6), could make the whole debt became due. The Court of Appeal took the view that UCB made several demands. In the leading judgment, after noting that defaulting on the appellant's part had started before the rescheduling agreement, Engwau J. A. said:

"Subsequently, the Bank issued the first demand notice on 1/7/91. The second demand was made on 1/10/91. The third demand for repayments of the loans was made by a letter dated 21/ 4/ 93 under Exhibit D7 almost 2 years after the rescheduling agreement was put in place."

I would hasten to point out, with due respect, that what the learned Justice of Appeal calls the 'third demand', dated 21.4.93., is not relevant to the question at hand, whether to appointment of the receiver on 21.7.92, was made after lawful demand. What need be considered, therefore, are the two letters which preceded to the appointment. In the supporting judgment, Okello J.A, said:

"In the instant case, a demand was made by exh.P7, a letter dated 1/7/9lfor the first instalment. The letter reads:
*'**Needless to say, the first instalment is expected to have been paid on the 1st July'***

Failure to comply with that demand turned the loan into a debt, which became due and the Bank immediately became justified to appoint a receiver. A further demand was made by another letter dated 1/10/91 before the Bank finally appointed a receiver by a letter of 2l/7/92. The complaint that there was no demand therefore had no merits. The trial Judge was in my view, right in finding so ".

The letter dated **1st** July, 1991, Exh.P7, which was addressed to the Managing Director of to appellant reads as follows:

"Further to our letter of even reference dated 25th *June, 1991, you are requested to formally accept the terms and conditions as laid dawn in our letter of]4th June, 1991 which was addressed to your lawyers and copied to you. You should also call at the office of the undersigned for the purpose of executing powers of attorneys in respect of the titles you lodged with us on 26th June, 1991.*
Valuation reports and Insurance policy covers for the stocks should as a matter of urgency be

submitted to this office. Needless to say, the first instalment is expected to have been paid on the 1st July 1991.

Please note that three of the titles that is Block 208 Plots 829, 279 and 280 bear mortgages of Gold Trust Bank and unless those mortgages are removed we shall not treat them as forming part of the security. "(emphasis is added)

I have said, earlier in this judgment that counsel for the respondent did not address the Court on this letter. Having regard to the contents of the letter as a whole I would not be surprised if he had the same difficulty that I have, to construe the statement *"the first instalment is expected to have been paid on 1st July, 1991* "as a demand for payment under an arrangement which, though agreed upon in principle, had not been finalized. In my view, the statement was simply a reminder that in accordance with the arrangement, payment of the first instalment was expected on the day the letter was being written, but a number of things had yet to be done. The appellant had yet to formally accept the terms and conditions; powers of attorney had yet to be executed; valuation reports and insurance policy covers had yet to be submitted; and mortgages earlier endorsed on three titles had yet to be removed. In that context, it appears to me clear that the statement was made to underline the urgency the appellant should apply to the matters pointed out rather than to demand payment of the first instalment.

The second letter, EXh.P8, dated 1st October, 1991, is addressed to the appellant and is captioned: "APPLICATION FOR FURTHER FACILITIES." It reads:-
"The Board considered your application for further facilities to import motor spare parts but decided that no further financing could be considered at the moment, especially when repayments under the schedule agreed upon with you in June 1991 were not being made. The Board also learnt with considerable concern that the Bill of Lading for the consignment which was expected from Dubai had been cancelled. It is hoped this is being rectified.

***For the** moment **you are urged to bring your payments under** existing **arrangements up-to-date and** follow up the consignment still in Dubai before presenting any more requests for further financing by the Bank. You are also requested to desist from approaching Directors individually on the business of your Company as this can be adequately handled through the Branch where the Company maintains its account"*. (emphasis is added)

There is no doubt in my mind that by comparison with the statement in the earlier letter, which I have just considered, the statement here: *"you are urged to bring your payments under existing arrangements up-to-date"* is more pointedly asking the appellant to make instalment payments that had become overdue. Whether the statement amounts to a demand for purposes of clause (7) of the debenture deed, however, is not as easy to answer.

In the Australian case of *Re Colonial Finance, Mortgage, Investment and Guarantee Corporation Ltd.*, (1905) 6 SRNSW 6, one of the cases cited in **Paget's Law of Banking,** the court had to determine if guarantors to a loan extended by a bank to its customer, were liable. The guarantors had undertaken to pay to the bank all advances made to the customer with interest**,** in case the customer, defaulted in payment *of the same or any part thereof on demand.* The liability of the guarantors would arise only after demand. The court considered whether any of three letters written by the bank to the customer amounted to such demand. Walker J., holding that the first letter was not a demand, went on to describe what a demand ought to be. He said:

"……..there must be a clear intimation that payment is required to constitute a demand: nothing more is necessary, and the word "demand" need not be used; neither is the validity of a demand lessened by its being clothed in the language of politeness; it must be of a preemptory character and unconditional, but the nature of the language is immaterial provided it has this effect".

It seems to me, that using that description per Se, as the test, the statement in Exh.P8 would pass as a demand. To me it is preemptory and unconditional though polite. However, I am not satisfied that it is the demand envisaged in clause (7). In my view, it is necessary to construe the word, not in isolation, but in the context it is used. In **Paget's Law of Banking, I1th** Ed. at p.244, the learned author writes**:**
"The making of a valid demand is of practical importance in two contexts. First, the date of demand is normally the date from which interest is claimed on overdue amounts Second, the making of a valid demand is normally a pre-condition to the right to realise security."

It is clear, in the instant case, that 'lawful demand was provided for in clause (7) of the debenture deed, as a pre-condition for UCB to realise the security through appointment of a

receiver and manager. According to the appellant's undertaking in the debenture, which I reproduced earlier in this judgment, upon the lawful demand being made, the appellant was to pay the balance on its account with the UCB.

Needless to say that the balance owing would be the entire amount of the loan remaining unpaid. It is that amount that comprises the "moneys" which under clause (7) would become payable as a result of lawful demand being made. It seems to me, therefore, that for the entire balance to become payable, the demand had to be for payment of the whole balance. The parties did not agree that demand for payment of part of the loan would make the whole balance due and payable as appears to have been the situation in the case of *Colonial Finance Mortgage investment And Guarantee Corp.* (supra) where the guarantee was to pay to the bank all advances made with interest

"In *case (the customer) makes default in payment of the same or part thereof on demand".*

In the instant case there was no similar provision in the debenture. I am, therefore not able to say that it was envisaged that a demand for payment of an overdue instalment would make the entire balance of the loan payable. In my view demand for what was already due and even overdue would not change the status quo. It is demand for the whole balance that would make a difference, namely rendering what was not yet due, immediately payable. I therefore, find that Exh. P8, being a request for payment of only instalments in arrears, was not a demand envisaged under clause (7) of the debenture deed. In absence of any other (apart from Exhs. P7 and P8), therefore, I would hold that the appointment of *Ws.* Key Agencies & Auctioneers as receiver/manager on 21 July 1991 was not made in conformity with provisions of clause (7) of the debenture deed, and for that reason was not property made. In my opinion, therefore, grounds 3 and 4 (b) ought to succeed.

Counsel for the appellant did not address the Court on ground *5* which reads;

"5. The learned Judges erred in law in holding that the instruction given by the Uganda Commercial Bank to the Auctioneers to lock up the shop and impound motor vehicles and sell them as well as sell the land, which was clearly not covered by the debenture, were not in excess of the bank powers or debenture deed and that the receiver/manager may proceed to exercise those powers ".

In view of my holding that the receiver/manager was not properly appointed for lack of prior lawful demand, I find it unnecessary to consider this ground.

However, I am constrained to observe that there has been unnecessary tendency to mix up matters pertaining to the debenture and those pertaining to the mortgage. In my view, the fact that the same firm was appointed receiver/manager and also auctioneer need not cause confusion. If the appointment of the receiver/manager had been properly made, the receiver/manager would have been able to exercise only those powers conferred on it in that behalf Similarly, if the mortgage deed had been validly executed, the auctioneer would have been able on behalf of the UCB, the instructing mortgagee, to exercise the power of sale over the mortgaged property.

Finally, learned counsel for the appellant did not address the Court on grounds I and 2. He was content to 'adopt the arguments" in his written submissions to the High Court. The grounds read:

"1. The learned Judges erred in law in not holding that Uganda Commercial Bank failed to workout an agreed package between the Bank and the appellant and advising Bank of Uganda of the position thereby breaching the Board's agreement with the appellant.
2. The learned Judges erred on law in holding that Uganda Commercial Bank did not accept to give to the appellant further funding".

With due respect to learned counsel, I do not think that the adoption of his arguments in the High Court per se at this stage was appropriate. This is an appeal against the decision of the Court of Appeal and it is incumbent on the appellant to show where, if any, that Court went wrong. Be that as it may, I do not find any merit in either ground. The Court of Appeal found that what had been agreed between the UCB and the appellant, had been reduced in writing in form of minutes of the meeting that discussed the appellant's proposal, and in the subsequent correspondence communication UCB's decision and the appellant's acceptance of that decision, all of which were produced in evidence. The court found that what was agreed did not include further funding. I am unable to fault that finding. I think grounds 1 and 2 ought to fail.

Before I take leave of the case, I should, for avoidance of doubt and possible confusion, point to two matters which, though mentioned, have not been subject of adjudication in this

appeal. First is the appellant's indebtedness to the respondent. In the High Court trial, at the close of the defence case, the court granted leave for amendment of the plaint whereby the quantum of the debt owed by the appellant was specified and the plaintiff prayed for an order that the defendant pays the same. As a result of the amendment, the following additional issue was added to the 8 which had been framed at the start of the trial, namely:

"Whether *the debt of Shs. 2, 288, 821, 4737= was due and owing to the plaintiff and due for payment."*

In his judgment, however, the learned trial Judge did not advert to that issue at all, let alone answer it. This may well be because counsel expressly stated, in the application for leave to amend, that the prayer for the order for payment was made in the alternative to the prayer for declaratory judgment. The omission however, was not subject of any cross-appeal and, therefore, the issue has not been adjudicated. The second matter is the additional security. I have held that the mortgage document was not validly executed. This only means that the intention to create a legal mortgage was not perfected. The fact that the appellant deposited several certificates of title as further security for the indebtedness was not in dispute at any stage of the case.

In the result, having found merit in grounds 3, 4(b) and 6, I would allow the appeal and set aside the orders of the Court of Appeal, and the High Court. I would substitute for the order of the High Court, an order rejecting the declaration prayed for, that UCB properly appointed M/s. Key Agencies & Auctioneers as receiver/manager and that it executes powers conferred through that appointment. I would allow to the appellant, three quarters of the costs in this Court, and costs in the Courts below.

Dated at Mengo the ....2nd day of ...March 2000.

J.N. MULENGA
JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS IS
A TRUE COPY OF THE ORIGINAL

……..

W. MASALU MUSENE

REGISTRAR, THE SUPREME COURT