THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANADA

AT MENGO

CIVIL APPEAL NO. 04/2006

(CORAM: TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA KATUREEBE,JJ.SC).

BETWEEN

FREDRICK J.K. ZAABWE :: APPELLANT

AND

1. ORIENT BANK LTD)
2. MARS TRADING CO. LTD)
3. ALLAN SHONUBI)
4. MARTIN NKUTU):::::::::::::::::::::: RESPONDENTS.
5. TITO TWIJUKYE)
6. RENZIGYE BYARUHANGA)

(Appeal from the Judgment of the Court of Appeal , at Kampala (Twinomujuni, Byamugisha and Kavuma, JJA) dated 23rd December 2005 in Civil Appeal No. 10 of 2003).

JUDGMENT OF KATUREEBE, JSC.

This is a second appeal by the appellant, both his original suit in the High Court and his subsequent appeal to the Court of Appeal having been dismissed.

The facts of the case are not in contention. The appellant, who is an experienced Advocate, found himself indebted to the Law Council, in the sum of Shs.1,000,000/= which he was required to pay within a given time. He did not have the money. He then approached a friend, also his client, one Livingstone Masambira Sewanyana to assist him to pay the money. Mr. Sewanyana agreed but required the appellant to execute a power of attorney in favour of 2nd respondent, a limited liability company, in which Sewanyana was a shareholder and director which would then borrow the money from a bank. On 7th November 1996, the appellant executed a Power of Attorney in respect of his land comprised in Kibuga Block 9 Plot 534. The appellant was the registered proprietor of that land. Sewanyana then gave to the appellant a personal cheque for Shs.1,000,000/= written in favour of the Law Council to settle the appellant's obligations to that body. The cheque was never honoured by the bank for want of sufficient funds on the account. The appellant reported this to Sewanyana, who advised that the cheque be re-banked. The appellant accordingly advised the Law Council to re-bank the cheque, which it did. The cheque bounced once again. In the meantime, Sewanyana had also introduced two of his fellow shareholders/directors in the 2nd respondent to the appellant, and the appellant surrendered to them not only the power of attorney but also the certificate of title in

respect of his said land. The Power of Attorney was then registered with the Registrar of Documents.

Thereafter, and on the basis of the Power of Attorney, the 2nd respondent mortgaged the appellant's property to the 1st respondent to secure its borrowing from the 1st respondent. A mortgage deed was duly drawn to this effect. The 2nd respondent defaulted and failed to pay back the money it borrowed from the 1st respondent. In consequence thereof the 1st respondent sold the property, Kibuga Block 9 Plot 534, to one Ali Hussein for Shs.35,000,000/= on 11th December 1998. On 19th May 1999, the appellant was evicted from his house on the property aforesaid by the 5th and 6th respondents. He and his family have consequently had to live away from his property. His law office or chambers which were also on the same property had to close. The appellant filed a suit in the High Court challenging the mortgaging and sale of his property and alleging fraud on the part of the respondents. He was unsuccessful. He appealed to the Court of Appeal which also concurred with the High Court that there was no merit in the case and dismissed his appeal, hence this second appeal.

The appellant filed six grounds of appeal and filed written submissions in support thereof. For ease of reference, I reproduce the grounds of appeal in full.

1. **“THAT the learned Justices of Appeal erred in law in that they allowed the trial Judge’s conclusion that the mortgage was made in consequence of the appellant’s power of attorney to stand when that conclusion was not supported by evidence on record.**

2. **THAT the learned Justices of Appeal erred in law in that they held that the mortgage against the appellant’s land was valid when it did not comply with the provisions of the law.**

3. **THAT the learned Justices of Appeal erred in law in that they held that no fraud was committed against the appellant when oral and documentary evidence on record clearly indicated that fraud was committed against him.**

4. **THAT the learned Justices of Appeal erred in law in that they failed to consider, review, appreciate the evidence on record and draw just conclusions.**

5. **THAT the learned Justices of Appeal erred in law in that they ignored the documents which the Court of Appeal under Reference No.90/2003, allowed the appellant to produce at the**

time of hearing his appeal and that this act denied the appellant of his right.

6. **THAT the learned Justices of Appeal erred in law in that they dismissed the appellant's appeal in complete disregard of the facts;**

   (i) **That D.W.1's evidence was false and unreliable**
   (ii) **That D.W.2's evidence was unreliable because it was hearsay.**
   (iii) **That the 2nd respondent did not file any defence or defend the suit or contradict the appellant's evidence.**
   (iv) **That the 4th, 5th and 6th respondents did not appear before the court and adduce any evidence to contradict that of the complainant."**

Before I consider the arguments in support of these grounds, I wish to comment on the grounds generally. Rule 81(1) of the Rules of this Court requires a memorandum of appeal to "set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, ……."

Clearly, some of the grounds set out in the memorandum of appeal infringe the above rule, in so far as they are argumentative and narrative. Parties or their counsel should always take care to file memorandum of appeal which comply with the rule. In the interests of justice, however, we decided to determine the appeal despite the defect.

In support of ground one, the appellant submits that the mortgage was not made on the basis of the appellant's power of attorney in that the mortgage deed referred to Kyadondo Block 9 Plot 534 and named the 2nd respondent as beneficial owners but did not refer to the appellant's name, power of attorney or Kibuga Block 9 Plot 534.

He submitted further that Section 114 of the Registration of Titles Act (R.T.A) only authorised the registered proprietor or holder of a power of attorney to mortgage the land, and that under the Eleventh Schedule to that Act, the mortgagor had to state the capacity under which he mortgaged the land. He submits that Kyadondo Block is different from Kibuga Block and therefore the land referred to in the mortgage was not his land. He further argues that powers of attorney are construed strictly, and the instrument will not bind the parties unless it complies with the provisions of the power of attorney. Therefore, he argues, in so far as the mortgage deed did not refer to the appellant or his title, it was unlawful to register the mortgage on the appellant's title. He cites the

Privy Council decision in the case of ***POWIS AND BYANT –Vs- Lc QUEBEC BANK, 1892 AC 170*** and also cites ***SINPRA –Vs- UGANDA REHABILITATION DEVELOPMENT FOUNDATION HSCS NO. 199 OF 1995*** for the proposition that the contracting party is bound to inquire into the extent of the agent's authority, if he is dealing with an agent, and that a power of attorney must be strictly construed.

In reply, counsel for the 1st, 3rd, 4th , 5th and 6th respondents, argued that the learned Justices of Appeal correctly found that the mortgage was made pursuant to the power of attorney given by the appellant to the 2nd respondent. He argues that the power of attorney was unconditional and did not state what the funds borrowed were to be applied to, nor did it provide a borrowing limit. He concedes that there was an error in the description of the property as Kyadondo Block 9 Plot 534 instead of Kibuga Block 9 Plot 534 as given in the power of attorney, but argues that there was never any doubt as to the property that was in contention in the minds of all the parties involved. He argues that since the appellant had himself visited the offices of the 1st respondent and confirmed that he had issued the power of attorney, he could not turn around to argue that the property mortgaged was not his property. The power of attorney had been duly registered with the Registrar of Documents as required by section 146(2) of the Registration of Titles Act, and this was submitted to the Registrar together with the mortgage.

He argues that it is not necessary in law to expressly reference the power of attorney, in the body of the mortgage deed, nor is it necessary to state that the 2nd respondent was a mortgagor by virtue of power of attorney, and failure to so state did not invalidate the mortgage. He submits that the Eleventh Schedule to the RTA is optional and does not require the capacity of the mortgagor to be stated. The language of the power of attorney was clear and was followed. He prays that ground one be rejected.

It is necessary to look at the record and consider the evidence that was adduced in court and which the lower courts evaluated. Ground one is similar to ground one of the memorandum which the appellant filed in the Court of Appeal. Twinomujuni, JA., who wrote the lead judgment, correctly in my view, directed himself with regard to the law as to the duty of the first appellate court. He states at page 5 of his judgment,

> ***"The duty of this court as the first appellate court is well settled. It is to evaluate all the evidence which was adduced before the trial court and to arrive at its own conclusions as to whether the finding of the trial court can be supported …..I have studied the record of the trial …………..and all the evidence which was adduced before the learned trial judge. I now proceed to evaluate the evidence and to***

pronounce myself on the conclusion reached by the trial court".

Having so properly directed itself as to its duty, the question is whether the Court of Appeal did actually evaluate the evidence in arriving at its decision. The crucial document in this case in my view, is the power of attorney. The appellant himself testified thus.

> ***"In October 1996, I was required to pay Shs.1,000,000/= to Law council in a matter that was pending there. I did not have the money to pay them. My client Livingstone Masambira Sewanyana learned that I was not able to pay. He offered to assist me. He proposed to me that his company called Mars Trading Company Ltd could borrow the money on my behalf if I executed a power of attorney in the company's favour over my land Kibuga Block 9 Plot 534". (Page 43 of record).*** (Emphasis added).

Even under cross-examination, the appellant maintained this position and in his evidence was not shaken. The appellant then proceeded to testify how Sewanyana introduced to him the other shareholders / directors of the company, and how Sewanyana gave to the appellant a cheque for shs.1,000,000/= in the names of the Law Council. The appellant then further testified at page 45 thus:

> ***"On 4th November 1996, Sewanyana, Martin Wetaya one Satyanarayana and another person whose name I did not know came to my home. On 5th November 1996, a valuer came and made a valuation report to Martin Wetaya. The property was valued at Shs. 40,000,000/=. At the time Wetaya worked for immigaration department.***
>
> ***On 7th November 1996, I executed a power of attorney in favour of Mars Trading Company Ltd."***

Apparently that same day 7th November 1996, he was invited to the offices of the 1st respondent where he signed a declaration that the property had no incumbrances. The power of attorney was then put in as exhibit P.II. In my opinion, the language of the power of attorney is crucial in the determination of this case. The power of attorney exhibited is quite clear. It states that:- the appellant "***appoints M/s MARS TRADING COMPANY LTED P.O. BOX 7528, KAMPALA my attorneys in fact in law and in my name and on my behalf to do and execute the following acts and things that is to say:-***

1) to use, mortgage or give in as security for a loan or loans my land and house situated at Kagugube Hill, Makerere and comprised in KIBUGA BLOCK 9 PLOT 534.

Clearly one of the acts authorised by the power of attorney is to mortgage his land comprised in Kibuga Block 9 Plot 534. There is no apparent doubt as to the property in question, i.e. his land and house at Kagugube Hill, Makerere . But it is important to note the language of the power of attorney. The 2nd respondent was appointed to act as attorney in *the* ***name of*** ***and on behalf of*** the appellant. It could not act on behalf of itself. It is therefore necessary to examine the nature and effect of a power of attorney in law. Can a donee of a power of attorney use it to his benefit and to the exclusion or detriment of the donor? Can a donee borrow money from the bank solely to finance his own business even where the donor of the power of attorney has no interest, and secure such borrowing by mortgaging the property of the donor?

> ***"BLACK'S LAW DICTIONARY defines "power of attorney" as "an instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of act on behalf of principal …….an instrument authorising another to act as one's agent or attorney………such power may be either general (full) or special (limited)."***

Section 146(1) of the Registration of Title Act states:

> ***"(1) The proprietor of any land under the operation of this Act or of any lease or mortgage may appoint any person to act for him or her in transferring that land, lease or mortgage or otherwise dealing with it by signing a power of attorney in the form in the Sixteenth Schedule to this Act."***

The point to note here is that the donee of a power of attorney acts as agent of the donor, and for the donor. He cannot use the power of attorney for his own benefit. The Privy Council decision, on an appeal arising from the Supreme Court of Canada, in the case of ***IMPERIAL BANK OF CANADA –Vs- BEGLEY [1936] 2 All ER 367*** is good authority for the principal that where an agent, who has been given a power of attorney to do certain things, uses the power to do something for a proper purpose, but the act done is for the agent's own purposes to the exclusion and detriment of the principal, the actions of the agent will be outside the scope of the power of attorney and are not even capable of ratification by the principal.

In the words of Lord MAUGHAM at page 374:

> ***"The first essential to the doctrine of ratification, with its necessary consequence of relating back, is that the agent shall not be acting for himself, but shall be intending to bind a named or ascertainable principal. If the suggestion of ratification in this***

case is analysed it comes to this, that the agent having put some of the principal's money in his pocket, the latter "ratifies" the act. For the reasons given this is not possible as a legal conception, since the agent did not take, and could not be deemed to have taken, the money for himself as agent for the principal."

In that case, a person who had been given a power of attorney by the respondent to operate her bank account with the appellant bank for purposes of carrying out some investment for her, had actually used the power to draw money from her account to pay off his own debts with the bank. This he had done with the full knowledge and concurrence of the bank. It was held that both the agent and the bank would be liable to the respondent.

In this instant case, the agent used the power of attorney to secure its own indebtedness to the 1st respondent with the full knowledge and participation of 1st respondent. The extent of the borrowing and the purpose for which the loan facilities were required was not disclosed to the appellant.

In ***FRIDMAN'S LAW OF AGENCY,*** 7TH Edition, the learned author discusses the effect of a donee of a power of attorney or agent using the

power for his own benefit and how this would affect third parties. Thus at page 118 – 119 it is stated:-

> ***"Notice of want of authority, whether the third party was actually aware of such want of authority or ought in the circumstances to have been aware of it, will mean that the third party cannot rely upon estoppel: if there is such notice, the third party cannot allege that he was misled into believing that the agency relationship existed and covered the acts of the agent. In this respect the fact that the agent was acting in his own interest, and not for the benefit of his principal, may be extremely relevant. Actual or constructive knowledge of this ought to put the third party on his guard and inform him that the agent was not acting within the scope of any authority …………..for example, if the agent pays his own debts with the Principal's money this should give the third party notice that the agent had no authority to draw on his principal's account, and this, in turn, will break the connection between the Principal's representation of authority and the third party's reliance thereupon."***

In the instant case, it is being contended for the respondent that the appellant signed a power of attorney in favour of the 2nd respondent, that the deed was not restricted and conditional in any way, and that therefore the donee had full authority to sign the mortgage. I am unable to agree with this argument. The authorities cited by the appellant establish that a power of attorney must be construed strictly. Citing the words of Lord Mac Naghten in the case of ***BRYANT, POWIS AND BRYANT LTD – Vs- La BANQE DO PEUPLE,*** the author of ***FRIDMAN'S LAW OF AGENCY***, state at page 66:-

> ***"In short the authority conferred by a power of attorney is that which is "within the four corners of the instrument either in express terms or by necessary implication."***

When the appellant appointed the 2nd respondent his attorney ***"in fact and in law and in my names and on my behalf to do and execute ……..."*** can he be said to have authorised the 2nd respondent to mortgage his property to secure its own borrowing for a business that was not his and in which he had no interest whatsoever? In my view the express language of the power of attorney meant that the 2nd respondent could only exercise the power on behalf of the appellant. Indeed evidence shows that this was the clear understanding of the appellant, , i.e. that the money borrowed would be for his benefit to cover his own indebtedness to the Law Council. It could not possibly be construed as

authorising the 2nd respondent to mortgage the appellant's property on behalf of itself, and for its own benefit to the exclusion and detriment of the appellant.

This also raises the question as to the roll and duty of the 1st respondent as a bank in this transaction vis – avis the person whose property is being given as security through a power of attorney. The use of the appellant's property by the donee of the power of attorney to secure its own borrowing for its own businesses far exceeded the authority given by the power of attorney in law and in fact. The evidence clearly shows that the 2nd respondent was a customer of the 1st respondent. The 2nd respondent had an existing overdraft facility with the 1st respondent. It sought further loan facilities from the 1st respondent to finance a business transaction it had with National Water and Sewerage Corporation. It needed, and apparently did not have, adequate collateral, hence the scheme to get the appellant's property. This, according to the evidence was known to the 1st respondent. The 1st respondent considered and evaluated the business proposal of the 2nd respondent and agreed to finance it. It must have known that the appellant was not part of the 2nd respondent be it as a shareholder or director. The money was put on the loan account of the 2nd respondent who used it to the full knowledge of the 1st respondent. At no point did the 1st respondent reveal to the appellant the purpose for which the loan to be secured by his property

was to be used for, other than asking him to sign for indicating that the property was free of encumbrances. In my view the bank having been put on clear notice by the power of attorney that the property to be used as security for the loan facilities to the 2nd respondent did not belong to the 2nd respondent, had a duty to disclose to the appellant the purpose for which the loan was going to be used by its own customer and debtor. I think that a fiduciary relationship now existed between the bank and owner of the property i.e. the appellant, which required the 1st respondent to make full disclosure to the appellant in so far as this loan was concerned. But the bank / 1st respondent chose to remain silent and only attempted to bring in the appellant to discuss the loan account for the 2nd respondent after the 2nd respondent had failed to pay the loan.

In the circumstances, I find that the execution of a mortgage by the 1st and 2nd respondents, to secure the borrowing by the 2nd respondent and not on behalf of the appellant, far exceeded the authority given by the power of attorney. The 2nd respondent with a full knowledge of the 1st respondent only used the power of attorney for its own purposes and not for the principal. The two respondents must be liable to the appellant for the loss he incurred. Had the learned Justices of the Court of Appeal properly re-evaluated the evidence and the law, they would not have come to the conclusion they did. In the result ground 1 must succeed.

The appellant argues in ground 2 that the Justices of Appeal erred in law for holding that the mortgage of his land was valid. He submits that the mortgage did not comply with the provisions of the law. His complaint is that the mortgage deed did not comply with the provisions of sections 116, 141, 154, 155 and 156 of the R.T.A and Section 8 and 13 of the Money Lenders Act. He asserts that the signatures of the mortgagor were not in Latin character as required by Section 148 of R.T.A nor were they translated in Latin character in the presence of the witness. He casts doubt on the identity of the persons that signed for the mortgagor, and questions the capacity of the witness, one Satyanarayan, who was an employee of the 1st respondent. He further argues that the signatures of the mortgagor should have been countersigned by a director or secretary. He cites the case of ***GENERAL PARTS (U) LTD –Vs-NPART, (S.C) CIVIL APPEAL NO.5 OF 1999*** as authority for the proposition that where the mortgage is not executed in accordance with section 148 of the R.T.A, it is not valid.

On his part, counsel for the respondents (other than 2nd respondent) submitted that the mortgage fully complied with the provisions of the law. The Money Lenders Act does not apply to a bank which the 1st respondent is. Section 115 of the R.T.A is a guide and not mandatory. Section 146 of R.T.A was complied with and the power of attorney was duly registered with the Registrar of Documents.

The major issue that I think deserves close scrutiny is whether the execution of the mortgage deed complied with sections 147 and 148 of the R.T.A. Section 147 deals with attestation of instruments and powers of attorney. Section 148 deals with signature of instruments and power of attorney.

Section 148 states:

> ***"No instrument or power of attorney shall be deemed to be duly executed unless either:-***
>
> (a) ***the signature of each party to it is in Latin character; or***
>
> (b) ***a transliteration 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 or her name are added to the instrument or power of attorney by or in the presence of the attesting witness at the time of execution, and beneath the signature or mark there is inserted certificate in the form in the Eighteenth Scheduled to this Act."***

I have carefully looked at the copy of the mortgage deed which was produced in court and appears at page 222 of the record. The parties to the deed are given as M/s ***MARS TRADING COMPANY LIMITED*** as

MORTGAGOR AND M/s ORIENT BANK LIMITED as Mortgagee. The execution page shows two signatures scribbled against ***MARS TRADING CO. LTD***, the mortgagor. These signatures are witnessed by another scribbled signature. All three signatures do not give the names of the persons signing nor the capacity in which they are signing on behalf of the 2nd respondent, or the capacity of the witness. The appellant does admit that the attesting witness was Satyanarayan who was a Bank Manager with the 1st respondent. On the other hand, the mortgagee is fully set out and signatures of authorised signatories duly appended thereto. Section 147(1) (a)(v) of the R.T.A authorises a bank manager to attest instruments. The appellant concedes that the attesting witness to the mortgagor's signatures was a bank manager. His quarrel is that this manager who was also the manager of the 1st respondent, the mortgagee should not have been the same person to witness the signatures on behalf of the mortgagor. It should have been by an independent witness.

A Board Resolution was exhibited in court (see page 214 of the record) which authorised any two of three directors of the 2nd respondent to execute documents for creating the mortgage. Further, Exhibit D5 at page 33 of the record which is the letter from the 1st respondent to the 2nd respondent communicating the availability of credit facilities was accepted by the said directors whose signatures appear on the document.

So there may not have been doubt in the mind of the 1st respondent's manager that the persons signing before him were directors of the 2nd respondent. But that was knowledge between the Bank and its customer. However, it has to be appreciated that the mortgage was to be registered at the Land Office. It is a public document in which third parties may have an interest. How was the registrar to know that the scribbled signatures without names or capacity of the signatories, and in absence of the company seal, had the authority to sign on behalf of the 2nd respondent? In my view, the rationale behind section 148 requiring a signature to be in Latin character must be to make clear to everybody receiving that document as to who the signatory is so that it can also be ascertained whether he had the authority or capacity to sign. When the witness attesting to a signature merely scribbles a signature, without giving his name or capacity, how would the Registrar or anyone else ascertain that that witness had capacity to witness in terms of section 147 of the Registration of Titles Act?

As stated above, the appellant cited the decision of this court in ***GENERAL PARTS (U) LIMITED –Vs- NPART (CIVIL APPEAL NO 5 OF 1999)*** as authority that where the signatures to a mortgage are not in Latin character, the mortgage is not valid. For the respondents, it was submitted that the case of **General Parts** is distinguishable from the present case. Counsel argued that in this case the power of attorney was

tendered in court, a resolution authorising the signatories on behalf of the mortgagor was tendered in court, which was not the case in the General Parts case, and that neither the mortgagee nor the mortgagor disputes the mortgage. Counsel cited ***BLACKS LAW DICTIONARY*** and ***STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES*** to define the word "signature." But in my view their definitions are irrelevant. Whatever definition one comes up with, the signature of instruments under the Registration of Titles Act must comply with section 148.

Therefore, as to whether the signature on the mortgage complied with Section 148, I must note the following: The names of the signatories are not given, nor their capacity to sign on behalf of the company. One cannot tell whether they are directors, secretary or even officers of the company at all. There is no company seal or stamp at all. Furthermore, even the witness to the signatures has neither disclosed his name nor his capacity to witness instruments as provided by section 147 of the Act. In the circumstances, how would the registrar know that the persons who signed the mortgage deed on behalf of the company, had authority to execute that deed? Or that the attesting witness had the legal capacity to do so? It is to be noted that the company had opted for signatures instead of the company seal as would have been permitted under section 132 of the R.T.A.

In my view, the execution of the mortgage by the 2nd respondent did not comply with the provisions of sections 147 and 148 of the R.T.A. I agree with the decision in the **General Parts** case (supra) that such irregularity renders the mortgage invalid.

The appellant also submitted that the mortgage was in violation of section 115 of the R.T.A.

The section states:

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

The specimen mortgage given in the 11th schedule would require that the mortgagor discloses his name and describe himself as being the registered proprietor. There can only be one rationale for this requirement; to prevent fraudulent people from executing mortgages over property that are not theirs. It not only enables the Registrar to ascertain that the mortgagor is indeed the registered proprietor, but also enables third parties to know that it was properly executed with authority. Looking at the mortgage in question, the 2nd respondent executed the mortgage as mortgagor even though it clearly was not the

registered proprietor. It is only vaguely described in the body of the mortgage as ***"beneficial owner."*** How would the Registrar, by looking at this mortgage deed know that the 2nd respondent had authority to mortgage this property? In my view, this would have been simply solved by the mortgage deed clearly stating that the 2nd respondent was acting under a power of attorney issued in accordance with section 146 of the Act.

This was a serious irregularity. However, it appears from evidence, that the Registrar accepted to register the mortgage because the power of attorney was presented together with the mortgage deed. But in my view, the Registrar was wrong to accept and register the mortgage. The body of the mortgage deed ought to disclose clearly the authority by which a person purporting to mortgage property not registered is his names is acting.

Counsel for the respondents has raised the argument that the appellant is trying to use technicalities to defeat substantive justice, and he cites Article 126 of the Constitution. With respect, I do not accept that argument.

Article 126(2) does not say that courts must not apply the law. It states:

126(2): " In adjudicating cases of both a civil and criminal nature, the courts shall, <u>SUBJECT TO THE LAW</u>, apply the following principles

(e) ***substantive justice shall be administered without UNDUE regard to technicalities,"***(emphasis added).

Therefore, the court must apply the law, but must not have <u>undue</u> regard to technicalities. The requirement for the signature to an instrument under the Act to be in Latin character is a matter of a substantive provision of the law, not a mere technicality. Furthermore, it is the respondents who have raised the technicality that because the appellant executed a power of attorney, and irrespective of whether that power of attorney was properly used, he should lose his property. That cannot be substantive justice. If a person is to be deprived of his property, then substantive justice requires that the law should have been followed in its entirety. To hold otherwise is to allow mere technicality to defeat justice. This court cannot allow such miscarriage of justice to occur.

In the result I would allow ground two of appeal.

Under ground 3, the appellant raised the matter of fraud. In my view, an allegation of fraud need to be fully and carefully inquired into. Fraud is

a serious matter, particularly where it is alleged that a person lost his property as a result of fraud committed upon him by others. In this case it was necessary to ask the following questions; was any fraud committed upon the appellant? Who committed the fraud, if at all? Were the respondents singly or collectively involved in the fraud, or did they become aware of the fraud? I find the definition of fraud in ***BLACK's LAW DICTIONARY 6TH Edition*** page 660, very illustrative.`

> ***"An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look or gesture…………….A generic term, embracing all multifarious, means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick,***

> ***cunning, dissembling, and any unfair way by which another is cheated, dissembling, and any unfair way by which another is cheated. "Bad faith" and "fraud" are synonymous, and also synonymous of dishonesty, infidelity, faithlessness, perfidy, unfairness, etc. …………***
>
> ***As distinguished from negligence, it is always positive, intentional. It comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false whether it be by direct falsehood or by innuendo, by speech or by silence, by word of mouth, or by look or gesture……"***

I have quoted this at length because all the elements of fraud contained therein appear to be present in the present case with respect to the actions of the directors / shareholders of the 2nd respondent. Looking at the evidence, there can be no doubt that Sewanyana and his two co-directors contrived a plot to get the appellant to give their company, the 2nd respondent, a power of attorney and surrender his certificate of Title to his property which they could, and did, use as a security to secure

their own borrowing from the bank, the 1st respondent. Clearly they took advantage of the appellant's problems with the Law Council, i.e. his inability to settle his financial obligations with that body. The fact that they gave a cheque which bounced, and then asked him to ask the Law Council to re-bank the cheque when they knew there was no money on that account, must be taken to show the bad faith and perfidy of these people. Their cheque bounced a second time.

And they still proceeded to mortgage the appellant's title, and obtained funds which they used for their own purposes. Having obtained and used the money, they then failed, refused or neglected to re-pay the loan. What could be more fraudulent than this?

I have no doubt that the directors of the 2nd respondent throughout the transaction acted fraudulently. They had clear intention to defraud the appellant of his legal rights to this property. In terms of the definition of ***"fraudulent"*** in ***BLACK'S LAW DICTIONARY:***

> ***"To act with "intent to defraud" means to act wilfully, and with the specific intent to deceive or cheat; ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself."***

The 2nd respondent gained financially in that it obtained a loan on the security of the appellant's property. It did not repay the loan, and the appellant lost his property. It is clear from the evidence, that they never had any intention to repay this debt and redeem the appellant's property. I therefore fail to see how both the High Court and the Court of Appeal could have held that there was no fraud committed against the appellant.

The question to resolve is whether the other respondents were part of this fraud. In the ordinary course of business, banks routinely accept to lend on the basis of security granted through a power of attorney. The Bank would have to satisfy itself that the power of attorney was duly given in accordance with section 146 of the R.T.A. The bank must satisfy itself that the mortgage subsequently executed is so executed in accordance with the provisions of the Act, including section 148. In my view, the bank must also satisfy itself that the donee of the power of attorney acts strictly within the power granted in the deed.

The question to answer then is whether the 1st respondent acted in the ordinary course of business as a bank in this transaction, or whether it had knowledge of the fraud, or indeed whether it was party to the fraud. The bank was to be the registered owner of a legal mortgage. For that interest to be defeated, it would have to be shown that the bank itself had either knowledge of, or had participated in the fraud. In the case of

KAMPALA BOTTLERS LTD –Vs- DAMANICO (U) LTD, (S.C. CIVIL APPEAL NO. 22/92) this court decided that even if fraud is proved, it must be attributable directly or by implication, to the transferee. Wambuzi, C.J stated at page 7 of his judgment;

> "***…….fraud must be attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act."***

The learned Chief Justice goes further to state:

> ***"Further, I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters."***

By analogy, it requires evidence to show that the bank as mortgagee had knowledge of the fraud of its customer, the 2nd respondent, in obtaining the power of attorney and the certificate of Title that was offered as security. Evidence shows that one of the managers of the bank was present when valuers visited and valued the property. Evidence shows that the bank invited the appellant to the bank to sign a declaration that there were no incumbrances on the property, which he did. This means that right from the beginning, the 1st respondent was aware that the

property belonged to the appellant, and not to the 2nd respondent or any other. The only nexus between the 2nd respondent and the property was the power of attorney. But clearly the 1st respondent knew that the 2nd respondent was not borrowing on behalf of the appellant. The proposal that it had agreed to finance did not include the appellant. A prudent banker should have asked itself why a person (the appellant) would give away his property to secure the borrowing of another for a transaction in which he had no interest whatsoever, a fact which was known to the 1st respondent. The evidence clearly shows that right from the beginning of the transaction, right up to the sale of the property, the 1st respondent knew that the appellant had no interest in the borrowed funds. It is only in August of 1997 that the 1st respondent wrote to the appellant to come to discuss the loan account of the 2nd respondent. Why had the 1st respondent not immediately informed the appellant when the loan was made, and only invited him to discuss the 2nd respondent account when apparently it had difficulties?

In my view, the 1st respondent had knowledge that the directors of the 2nd respondent were acting dishonestly with regard to the appellant's property.

The 1st respondent appears only to have been interested in getting hold of some property to secure credit already given executed to their

customer, the 2nd respondent. It did not scrutinize the power of attorney, or if it did, it chose to ignore the provision therein, and surprisingly for a bank, did not even insist on a proper execution of the mortgage. Its own manager was quite happy to witness the signatures of the directors of the 2nd respondent on the mortgage deed, which I have already discussed, without even disclosing his full identity.

In the result I find that fraud was committed on the appellant by the 2nd respondent's directors / shareholders. I also find that the 1st respondent had, at the very least, constructive notice of the fraud but chose to ignore it. The transaction of the mortgage between those two parties was totally null and void on account of that fraud.

The counsel for the respondents argued that third party rights had accrued and therefore cannot be defeated. ***He cited the case of DAVID SEJJAKA NALIMA Vs REBECCA MUSOKE, SCCA 12/85 [1992] V KALR*** , in support of the principle that a bona fide purchaser for value cannot have his transfer defeated by fraud per se. This is enshrined in section 181 of the R.T.A. In my view and to my understanding of that decision, this applies where the purchaser was not party to the fraud or he had no knowledge of the fraud at the time when he purchased.

Evidence shows that the 1st respondent wrote to the appellant in August 1997 informing him that his property had been mortgaged. The appellant, while alleging fraud, took several steps including the lodging of a caveat on the title, and initiating legal proceedings against the 1st and 2nd respondents to try to recover his property. The letter dated 15th August, 1997 is itself indicative of the callousness with which the 1st respondent approached this matter in respect of the appellant. The letter addressed to the appellant states:-

"Dear Sir,

Sub: A/c M/s Mars Trading Company Limited.

We request you to call on us in order to discuss conduct of the above account as the mortgage on your property is given as security for the overdraft facility granted by us to M/s Mars Trading Company Limited."

Yours faithfully,

B.M. Satyanaranyan
SR. Manager"

This senior manager knew that the appellant was not party to that account. How could he discuss its conduct?

Be that as it may, the caveat on the title was still subsisting at the time when the third party, one Ali Hassan purchased the property and signed a Sale Agreement with the 1st respondent. Clause 5 of the agreement states:

> ***"The vendor shall also ensure that it obtains a removal of the caveat lodged on the property by Mr. F.J.K ZAABWE."***

Indeed, Shonubi Musoke & Co. Advocates did write to the Registrar on 26th February 1999 urging the removal of the caveat as the 1st respondent had in fact already sold the property. These lawyers were fully aware that there was a caveat when they proceeded to prepare the sale of the property while urging the Registrar to remove the appellant's caveat.

How can a purchaser who buys a property subject to a caveat claim not to have had notice, the merits or demerits of the caveat notwithstanding. In my view, Ali Hassan bought property that was subject of a caveat. He cannot be a bona fide purchaser without notice. In the circumstances, the transfer to him is defeated by the fraud.

It has to be noted that in the peculiar circumstances of this case, the same law firm, Shonubi Musoke & Co. Advocates acted in all these

transactions, i.e. The mortgage, the sale of the property and transfer to Ali Hassan. The lawyers were aware that the appellant was alleging fraud in the mortgaging of his title and its proposed sale. He was in the process of conducting a criminal prosecution over the matter. Indeed, when the Registrar wrote to the appellant on 16th March 1999 giving him notice to remove the caveat, the appellant wrote back on 10th May, 1999 thus:

The Ass. Registrar
Mailo Office
Kampala.

Dear Sir,

Re: (a) KB 9 PLOT 534

(b) Misc. APPL. NO.458/99

With respect, I refer to the above title and to your notice dated 16th March, 1999 relating to the removal of my caveat from the above title. I beg to inform you that I made an application for an order extending my caveat until Criminal Proceedings under Misc. Application No. 07/99 are disposed of. The same is fixed for hearing on the 17th June, 1999. A Photostat copy of the Notice of Motion is attached hereto. I shall therefore be grateful if you would postpone the removal of the above title until the final disposal of the above application".

Clearly then, even as late as May 1999, the caveat was still on the property, yet the sale had been already completed. The lawyers were

aware of this fact when they also acted for Ali Hassan. In his evidence, Mr. Shonubi accepted having taken Ali Hassan to the Registrar. He states:-

> ***"The Registrar of Titles summoned me concerning this transfer, it was effected before the title was changed from the names of Frederick Zaabwe to Alwi. I went there twice. On the first occasion the Registrar asked me to go back with the gentleman called Alwi. I objected saying it was not necessary to go with Alwi. The Registrar insisted so I took Mr. Alwi there"***

Mr. Shonubi would not have taken Alwi unless he was his client, and Mr. Shonubi knew all about the dispute and the allegations of fraud on the property. In that regard, the SEJJAKA case supra, is authority for the principle that where an Advocate acts for a party and he has knowledge or notice of alleged fraud, that knowledge or notice will be imputed to his client unless the client himself is defrauded by the advocate. Odoki, JA(as then was) said:

> ***"It seems to me that where a purchaser employs an agent, such as an advocate, to act on his behalf the notice he receives, actual or constructive, is imputed on the purchaser. And similarly where the advocate acts for both parties any notice he acquires is ordinarily imputed on both parties. There is an exception to this principle where the agent deliberately defrauds the purchaser.".***

I therefore do not accept counsel's argument that third party rights have accrued and therefore cannot be defeated. All the parties involved in this transaction knew or had notice of the allegations of fraud. The SEJJAKA case itself is authority that fraud committed by or known to the purchaser of the property will impeach the title of that purchaser as he can no longer be a bona fide purchaser .

Furthermore it appears that the transfer to Ali Hassan was itself conducted irregularly.

According to a memorandum from all Registrars to the Commissioner for Land Registration dated 19th August 1999, it appears that the 1st respondent had in fact already released the mortgage. The memorandum reads in paragraph 2 as follows:-

> ***"The bank released the mortgage which would otherwise give them the power to sell. Releasing the mortgage ahead of their transfer deprives them of the power to sell. The release of mortgage should be formally withdrawn first."***

In fact the 1st respondent then wrote to the Registrar withdrawing the release of mortgage. The memorandum also states that proper stamp duty had not been paid.

Then in paragraph 4, it states:-

"It seems the transfer instrument itself is defective. The signature of the purchaser was not attested as the law requires.

OPINION: ***In light of the paragraphs 2, 3 and 4, we are of the opinion that the transfer should be rejected and the Advocates advised to remedy the defects."***

The memorandum is signed by one Edward Karibwende.

The above reinforces my strong opinion that the sale and transfer of the appellant's property by the 1st respondent was not done in good faith. It is inconceivable that a bank would execute a release of mortgage, and then seek to withdraw it. It is inconceivable that such important steps like the payment of stamp duty and the execution / attestation of documents could be so badly handled. All this goes to show that the transfer was tainted with bad faith and or illegalities and cannot be characterised as one to a bona fide purchaser. I therefore hold that the transfer to Ali Hassan was null and void and of no legal consequence. I also find that the eviction of the appellant from his property was wrongful and amounted to trespass on his property by the 5th and 6th respondents.

With regard to the 3rd and 4th respondents the evidence is that they were at all times acting on behalf of the 1st respondent, a named principal. The question however, is whether they acted in good faith throughout this transaction. Had they exercised due care and diligence as lawyers and correctly advised their client this case may not have arisen. This is a matter the 1st respondent may wish to pursue further with his lawyers and other relevant authorities. But in relation to the appellant I would dismiss the appeal as against them but they shall bear their own costs.

The 5th and 6th respondents were, as bailiffs, executing the instructions of the 1st respondent. The eviction of the appellant is therefore attributed to the first respondent who must take liability for the same. The appeal against them fails. But given their conduct and the fact that they refused or neglected to attend court when called upon to give evidence, even when they were defendants, I make no order as to costs in respect to them. The principal parties who must take responsibility and liability for the unlawful mortgaging and sale / transfer of the appellant's property are the 1st and 2nd respondent.

I now turn to the question of reliefs prayed for by the appellant in his plaint filed in the High Court. The appellant prayed for, inter alia, general damages for trespass to land and inconvenience caused to him and his family, exemplary damages / aggravated damages, and mesne

profits. He also prayed for interest at the rate of 50% from 25th November 1996. I must note that both the High Court and the Court of appeal did not consider the issue of damages, having dismissed the suit and appeal respectively. Given the long period this case has taken in the courts, I believe this court may go ahead and assess the damages. I also note that although the appellant detailed the claim for mesne profits in his submissions to the High Court, there is no evidence that was led to prove this claim. His own detailed claim in the submissions was for shs.22.5 million from 25th November 1996 to November 2001. In absence of concrete evidence on record as to the mesne profits that would attach to this property, I am constrained to reject this claim.

With regard to exemplary damages, the appellant seems to equate them with aggravated damages. SPRY, V.P. explained the difference succinctly in ***OBONGO -Vs- KISUMU COUNCIL*** **[1971] EA 91, at page 96;** ***"The distinction is not always easy to see and is to some extent an unreal one. It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature. On the other hand, exemplary damages are completely outside***

the field of compensation and, although the benefit goes to the person who was wronged, their object is entirely punitive."

In the circumstances of this case, as discussed in this judgment, I do not think this is a case that qualifies for an award of exemplary **damages as envisaged in *ROOKS* -Vs- *BARNARD AND OTHERS* [1964] A.C. 1129,** which is very well considered by **SPRY – VP** in his judgment in the **Obongo Case (*supra*)** at page 94. The gist of that decision is that exemplary damages may be awarded in this class of case. In the words of SPRY, V.P. at P. 94 these are: ***"first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and, secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. As regards the actual award, the plaintiff must have suffered as a result of the punishable behaviour; the punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings if the conduct were criminal; and the means of the parties and everything which aggravates or mitigates the defendant's conduct is to be taken into account. It will be seen that the House took the firm view that exemplary damages are penal, not consolatory as had sometimes been suggested."***

It has to be borne in mind that the respondent were private persons and not acting on behalf of any government or authority.

I think this is a case where the appellant should receive enhanced compensatory damages not only for the unwarranted and wrongful deprivation of his property, but also because of the conduct and apparent arrogance of the respondents. In my view, this is not the type of case where the respondents are likely to repeat their wrongs on the appellant.

In considering an award of enhanced or substantial general damages, I must take into account the station in life of the appellant. He is a senior lawyer and a respected member of society. He has a family who all lived on the property from which they were wrongfully evicted. Part of the property was used as offices for his law chambers. The appellant testified that as a result of this eviction, he had to find alternative accommodation for his family. He lost not only some of his books and files but also his clients. His livelihood as a lawyer was compromised. He suffered much humiliation and distress.

He has since been denied use of his property for the period of about 10 years. The appellant had made a total claim for shs.307,000,000=. I am of the view that this a case where substantial damages should be awarded. Given the circumstances of this case, I would award to the

appellant Shs.200,000,000/= (two hundred million) as aggravated damages.

In the result I would allow the appeal, set aside the judgments of the Court of Appeal and the High Court and substitute therefor judgment for the appellant and order as follows:

a) The Registrar of Titles shall forthwith cancel the registration of the mortgage of the suit property to the 1st respondent and the transfer thereof to Ali Hassan and reinstate the appellant as the registered proprietor who shall be entitled to vacant possession thereof.
b) **IN THE ALTERNATIVE** to (a), in case the suit property was lawfully transferred from the said Ali Hassan to a bona fide purchaser for value prior to this judgment, the 1st and 2nd respondents shall jointly and severally pay to the appellant the current market value of the suit property to be determined by a valuation surveyor appointed with approval of a judge of the High Court.
c) the 1st and 2nd respondents shall jointly and severally pay to the appellant aggravated damages in the sum of Shs.200,000,000/=.
d) the 1st and 2nd respondents shall jointly and severally pay to the appellant costs here and in the courts below,
e) costs for valuation if any,

f) interest at the rate of 10% p.a., on (b) from the date of valuation if any, and on (c) from the date of this judgment till payment in full.

Dated at Mengo this 10th day of July, 2007.

Bart M. Katureebe
JUSTICE OF THE SUPREME COURT

JUDGMENT OF TSEKOOKO, JSC

I have read the judgments prepared by my learned brothers Katurebe, JSC and Kanyeihamba, JSC. I agree with their conclusions as well as the concurring judgment of Mulenga, JSC that the appeal should succeed. I also agree with the orders proposed by Katureebe, JSC. The facts in this appeal and the grounds of the appeal have been set out in the judgment of Katureebe, JSC. It is unnecessary for me to set out the same facts in detail.

In his prolix plaint, the appellant, as plaintiff, pleaded the transactions that led to his being induced into signing powers of attorney by which he appointed the 2nd respondent as the donees of those powers. The purpose of the power of attorney was to enable the second respondent to borrow she. 1,000,000/= with which the appellant would clear his indebtedness to the Law Council. The second respondent, its directors and one Livingstone Sssewanyana betrayed the appellant's trust by not enabling the appellant to clear his indebtedness to the Law Council as originally agreed. A cheque which the said Ssewanyana, on behalf of second respondent, gave to the appellant to discharge the indebtedness to the Law Council was twice dishonoured in 1996 by (Ssewanyana's bankers) Greenland Bank Ltd, because there was no money on the account on which the cheque was drawn. Surely that was deceit. The second respondent mortgaged the appellant's property to the 1st respondent for an old loan which never benefited the appellant at all. Evidence shows that the mortgage was to cover an existing loan of the 2nd respondent. The appellant discovered subsequently that the 1st respondent intended to dispose of his property because the second respondent had defaulted in servicing that loan. He therefore lodged a caveat on the register of titles. Despite that caveat, the 1st respondent sold the appellant's house and land to one Alwi Hassan. The appellant, members of his family and his

tenants were evicted from the house where he and his family lived and where he carried out his Law Practice.

The appellant sued the respondents. In his plaint he make allegations of fraud against the respondents. The 2nd respondent never defended the suit, it is deemed to have admitted the allegations of fraud. Apparently the appellant obtained an interlocutory judgment against the second respondent. The rest of the respondents pleaded general denials.

The second issue framed for determination by the trail judge was whether the respondents collectively committed fraud against the appellant. This arose from particulars of fraud pleaded in the plaint. During trial the appellant adduced evidence to support those particulars. That evidence on fraud does not seem to have been discredited nor rebutted.

The appellant's evidence established very clearly that the 2nd respondent had the powers of attorney solely as an agent of the appellant. Yet the second respondent mortgaged to the 1st respondent the appellant's house and land to secure an existing loan for its own benefit. The mortgage money was not for the benefit of the appellant. Evidence proves that the first respondent, a bank, knew this all too well. There could be no better evidence of fraud against the first respondent, and the second respondent with its directors. Indeed the dishonour of

Ssewanyana's cheque which dishonour must on the facts existing at the time have been known by the 2nd respondent is evidence of fraud. The evidence clearly shows that all of them were engaged in an enterprise in which the appellant had no interest whatsoever. The enterprise was to ensure that the 2nd respondent's old loan from the 1st respondent was secured. The enterprise was intended only to benefit the 2nd respondent and its directors. The appellant never authorised the 2nd respondent and its directors to mortgage his property to cover the latter's loans or indebtedness. I agree with the reasoning of Katureebe, JSC and Mulenga, JSC on this point.

I have perused the judgment of the trial judge. With due respect to him, I think that the learned judge did not give due and proper weight to all the evidence of the appellant especially that part of evidence relevant to the proof of fraud against both the 1st and 2nd respondents. Similarly, and with great respect to the Court of Appeal, it did not adequately reevaluate the appellant's evidence especially concerning the fraud. I am a little puzzled by the conclusions of the Court of Appeal to the effect that the trail judge "exhaustively evaluated all the evidence before him," when the record points to the contrary.

In the Court of Appeal grounds 6 and 7 complained about failure by the trial judge to find that there was fraud. These two grounds read thus:

"[6] That the learned judge erred in law and fact in that he held that no one questioned the existence and legitimacy of the power of attorney when the appellant alleged that it was obtained from him fraudulently.

[7] That the learned judge erred in law and fact in that he held that there was no fraud against the appellant when this finding conflicted with the evidence before the Court."

Clearly fraud was the foundation of the appellant's case. As a first appellate Court, and in the light of those contentions, the Court of Appeal ought to have subjected the whole evidence, including the additional evidence admitted by the Court itself, to a fresh and exhaustive scrutiny so as to form its own inferences. As my learned brother Katureebe, JSC demonstrates, with great respects, the Court did not do this. In that respect the court erred and consequently and inevitably reached a wrong decision.

There is the question of sale of the suit property to one Alwi Hassan, a third party. I entirely agree with the reasoning of my learned brother, Katureebe, JSC, that Alwi Hassan cannot on the facts of this case, claim to be a bona fide purchaser and therefore his purchase is vitiated by the fraud. The existence of a caveat on the register should have put him on notice.

In my opinion, it would be wholly inequitable to permit both the 1st and the 2nd respondents to benefit from their fraudulent conduct

by which they deprived the appellant of his property. I would allow the appeal. I would set aside the judgments and orders of the two courts below.

The next question is about reliefs. In his detailed plaint and his submissions in the trial Court, the plaintiff prayed for diverse declarations and damages. After dismissing the suit the learned trial judge said nothing on prayers for damages.

It is now an established judicial practice that where a plaintiff claims for damages and the suit is dismissed; a trial judge should assess damages that would have been awarded if the suit had succeeded: This is illustrated in **Construction Engineers and Builders (U) Ltd Vs. Attorney General**, Supreme Court Civil Appeal No. 34/1994 reported in **Certified Judgments of Supreme Court 1995 Vol. I**. In the present case, the learned trial judge did not assess any damages even though the appellant asked for damages both in his plaint and in his lengthy submissions to the learned judge. What should this Court do? In his submissions in this Court, the appellant prayed that this Court grants him the reliefs he prayed for. Counsel for the respondents simply asked us to dismiss the appeal.

Normally after determining the appeal we would remit the matter to the trial judge for him to assess damages. However, we note that this case has been in courts for about ten years. Further

there is ample credible evidence on the record to enable us make the assessment. In addition the detailed submissions to the trial judge and Court of Appeal of both the appellant and the respondents are on the file.

So we can assess the damages. Counsel for the appellant, (as plaintiff) filed unusually lengthy written arguments consisting of 108 pages. He prayed for diverse declarations and damages such as general, punitive, exemplary and special damages. He asked for a total amounted of shs. 307m/=. He gave various reasons and quoted many decided cases in support of his prayers. Counsel for the 1, 3, 4, 5 and 6th respondents merely contended that the appellant was not entitled to any damages. Counsel in effect did not criticise any of the reasons and or the authorities upon which the appellant relied. Clearly the six respondents who defended the suit were heard on the prayers by the plaintiff for damages. Consequently I consider it proper for us to assess damages and grant appropriate reliefs on the basis of the available evidence and submissions.

I agree with the reasons given by my learned brothers that shs. 200,000,000/= as aggravated damages is adequate compensation for the suffering which the appellant and his family suffered. It is generally agreed that no two cases are similar. This is a special case presenting peculiar facts of its own as pointed

out by Katureebe JSC. Therefore, an award of 200m/= as damages here is proper.

I would allow the appeal as regards the 1st and the 2nd respondents. For the reasons given by Katureebee, JSC, with which the other brothers concur, I would dismiss the appeal in respect of the 3rd, 4th, 5th and 6th respondents and make no order as to costs in regard to each of these four respondents. I say so because I agree that they are not entirely free from blame in the process leading to the defrauding of the appellant by the 1st and the second respondents. I do not share the contention of Counsel for the respondents that “the issue of eviction had no bearing as the property had been sold.”

1. The 1st respondent’s registration of mortgage on KB9 plot 534 is invalid, null and void on account of fraud and is hereby cancelled.

2. Accordingly I agree that the appellant is entitled to an award to him of shs. 200m/= as aggravated damages. These damages will carry interest at the rate of 10% p.a from 1st March, 2002 the day when the trial judge decided the suit. I find no sound basis for the claim for 50% rate of interest.

3. Any purported sale and or transfer of the said property to Alwi Hassan is hereby cancelled. The Registrar of Titles is

directed to reinstate the appellant as owner and registered proprietor. If a bonafide transfer has been made to a third party after the transfer to Alwi Hassan, the 1st and second respondents must pay to the appellant the current market value of the property. That current market value is to be determined by a qualified valuation surveyor to be approved by a judge of the High Court.

4. The 1st and 2nd respondents jointly and severally are to pay costs of the appellant here and in the courts below.

As the other members of the court agree, with orders proposed by Katureebe JSC, it is so ordered.

Delivered at Mengo this 10th day of July 2007.

J. W. N. Tsekooko
JUSTICE OF THE SUPREME COURT.

JUDGMENT OF KAROKORA, JSC:

I have had the benefit of reading in draft the judgment prepared by my learned brother, Katureebe, JSC. I agree that the appeal ought to succeed and I further concur with him in the orders he has proposed and more especially with the reasons he has given for the award of general damages.

Dated at Mengo this: 10th day of July 2007.

A. N. KAROKORA
JUSTICE OF THE SUPREME COURT.

JUDGMENT OF MULENGA, JSC

I had the benefit of reading in draft, the judgment prepared by my learned brother, Katureebe, JSC. I agree with him that the appeal ought to succeed and I concur in the orders he has proposed. I am however constrained to add a couple of observations particularly in connection with the manner in which the Court of Appeal misconstrued the issue of fraud.

The facts of the case are amply set out in the judgment of my learned brother and I need not recount them in detail. It suffices to say that the appellant alleged both in his pleading and evidence that he granted to the 2nd respondent a power of attorney over the suit property in order that the
2nd respondent procures for him the sum of Shs. 1,000,000/=, which he needed to settle an indebtedness to the Law Council. The 2nd respondent used the power of attorney to mortgage the suit property as security for repayment of a loan of Shs. 15,000,000/= it obtained from the 1st respondent. The appellant did not benefit from the loan as it was exclusively applied to the

business of the 2nd respondent. Instead, one Livingstone Sewanyana, a director of the 2nd appellant gave to the appellant a personal cheque for Shs. 1,000,000/= payable to the Law Council. The cheque was dishonoured twice for lack of funds in the account on which it was drawn. The appellant never received payment of the said amount for which he had granted the power of attorney.

Subsequently, as a result of the 2nd respondent's default in loan repayment, the 1st respondent, as mortgagee, sold the suit property on which were the appellant's residence and office and other residences occupied by tenants. The appellant and his family as well as the tenants were evicted.

It is clear from the evidence that Sewanyana's cheque drawn in favour of the Law Council was a ruse. There was no intention to honour the undertaking made to the appellant otherwise the payment would have been effected from the loan the 2nd respondent secured from the 1st respondent. It is on basis of that background that the appellant contended in this suit that he was defrauded.

In the lead judgment of the Court of Appeal, Twinomujuni, J.A., highlighted five issues that arose from the fifteen grounds of appeal. The first two read –

"(a) Whether the Power of Attorney was obtained from the appellant by fraud.

(b) ***Whether the mortgage on the appellant's land was executed by fraud."***

The learned Justice of Appeal answered both in the negative. He premised the answers on the following facts, namely that -

- The appellant granted the power of attorney and surrendered the title certificate in exchange for the cheque of Shs. 1,000,000/=;
- The power of attorney was not conditioned to the cheque being honoured;
- The appellant did not revoke the power of attorney or lodge a caveat on his title when the cheque was dishonoured twice;
- The appellant consented in writing to a mortgage of the suit property being executed by the 2nd respondent in favour of the 1st respondent.

In concluding that there was no evidence to support any claim that the power of attorney was obtained by fraud, the learned Justice of Appeal observed -

"In facts on 7th November 1996 when he consented to the mortgage being executed …… he had no evidence whatsoever, nor did he insist on it, that the

cheque would be honoured."

Surely, it is also true that the appellant had no evidence whatsoever that the cheque would be dishonoured! With the greatest respect to the learned Justice of Appeal, it is farfetched to hold as is implicit in this extract, that the appellant consented to his property being mortgaged irrespective of whether the payment to the Law Council was effected or not. The gist of what the appellant testified on this point is -

> ***"He*** [Sewanyana] ***proposed to me that his company called Mars Trading Company Ltd could borrow the money on my behalf if I executed a power of attorney in the company's favour over my land Kibuga Block 9 Plot 534."***

In cross-examination he reiterated -

> ***"The purpose of the power of attorney was to get money which Livingstone Masambira Sewanyana assured me that his company would borrow on my behalf. Later it proved a deceit …..***
>
> ***All I was interested in was to get money and solve my problem hence execution of the power of attorney.***

That evidence was not contradicted or otherwise discredited. The 2nd respondent did not defend the suit let alone lead evidence showing that the power of attorney was granted for any other purpose. Indeed the learned Justice of Appeal did not find that the appellant granted the power of attorney, surrendered his certificate of title and consented to the mortgage of the suit property for any other consideration or ex gratis. Clearly, therefore, what led the appellant to grant the power of attorney and to consent to the mortgage of the suit property was the false promise

that the 2nd respondent was to borrow Shs. 1,000,000/= for him. Invariably a person is effectively defrauded by another because he accepts to act on that other's deceit. The appellant may be criticized, as it implicit in the reasoning of the learned Justice of Appeal, for being naïve in believing Sewanyana and for being inept in failing to lodge the caveat more promptly, but that is no reason to hold that the appellant was not defrauded.

I concur in the reasons my learned brother has given for holding that the appellant consented to the mortgage of the suit property through the fraud, and for finding that the mortgage was not executed in accordance with the law and was therefore null and void. I have nothing to add, except to observe that it is surprising, to say the least, that despite the glaring defects of the mortgage document and the apparent initial inhibitions, the Registrar of Titles eventually accepted to register the mortgage. It is equally surprising that notwithstanding the appellant's caveat and queries raised about the transfer instrument, the Registrar of Titles registered the transfer.

Lastly, I agree that the appeal as against the 3rd, 4th, 5th and 6th cannot succeed in as much as their respective participation in the activities complained of was in the capacity of agents of disclosed principal. However, in view of their role in rendering the fraud effective it would be unconscionable to award costs to them against the victim of the fraud.

Dated at Mengo this 10th day of July 2007.

J.N. Mulenga

Justice of the Supreme Court.

JUDGMENT OF KANYEIHAMBA, J.S.C

I have had the benefit of reading in draft the judgment of my brother, Katureebe, J.S.C and I agree with him that this appeal be allowed.

The facts of this case have been ably set out in the judgment of Katureebe, J.S.C. and I will only refer to such of them as will be necessary for my judgment.

For convenience, I shall refer to the appellant as the Plaintiff. The plaintiff is the owner of the land and houses situated at Makerere, Kagugube in the District of Kampala in the registered title, KB9 plot 534 which I shall herein after refer to as “the suit property”. The 2nd respondent was a trading company owned by Messrs Martin Wetaya, Frank Ochom and Livingstone M. Sewanyana who also happened to be a client of the appellant, then a practicing advocate.

In October 1996, the appellant found himself indebted to the Law Council in the sum of one million shillings which he was required to pay immediately. This indebtedness came to the knowledge of Sewanyana who promised that

his company, Mars Trading Co. Ltd, the 2nd respondent, would pay the money owed to the Law Council and as a consideration, the appellant would execute a power of attorney and hand over the title deeds of the suit property to the 2nd respondent. Although the 2nd respondent dishonoured this arrangement by issuing a cheque which was dishonoured twice, nevertheless its directors / shareholders took advantage of the power of attorney and possession of the title deeds of the suit property and secured a mortgage from the 1st respondent who entered into the mortgage agreement fully aware that the property was actually owned by the appellant. The mortgage was secured to protect an overdraft obtained by the 2nd respondent from the 1st respondent and had no connection whatsoever with the appellant, his interest or liabilities.

The 3rd, 4th, 5th and 6th respondents acted for the 1st and 2nd either as advocates and bailiffs respectively.

On discovering what he believed to be the loss of his property by fraud, the appellant filed a High Court suit and placed a caveat on the suit property. He lost his claim in the High Court and his appeal to the Court Appeal was dismissed. Hence this appeal.

The Memorandum of Appeal is reproduced in the judgment of Katureebe, J.S.C. and I agree with his observation that some of the grounds of this appeal contravene rule 82 of the Rules of this Court.

Be that as it may, in my opinion the most crucial and important grounds of this appeal are grounds 3 and 4 which are reproduced in the judgment of Katureebe, J.S.C (supra). An allegation of fraud in any transaction, let alone that affecting land, must be considered seriously and judiciously for, if proved, it will vitiate all subsequent transactions. Secondly, where it is shown that the first appellate court failed to reevaluate the evidence in a case, this court must do so.

In this judgment, I will commence with ground 4 of the appeal. In his written submissions to the Court of Appeal, Mr. Mubiru, counsel for the appellant contended that;

> ***"Regarding the facts there are three disputed facts:-***
>
> 1) ***The reason behind the grant of appellant's power of Attorney. Evidence was led at the trial that the appellant required funds to settle an outstanding obligation with Law Council. He therefore needed credit for purposes of payment of the amount. That evidence***

was not rebutted at the trial and this court should make a finding of fact that that was the reason.

2) ***Whether the appellant's title was used as security for an existing security or a fresh one. We submit that the mortgage instrument at page 222 R/A is site at (**sic**) on this issue that evidence was led being the bank statement of 2nd respondent's account at page 272 R/A indicating that it already had an existing overdraft on that account for which reason the mortgage would be for past consideration.***

As regards the first issue covers ground 6 of the grounds of appeal. This issue is whether the power of Attorney was procured by fraud. The appellant pleaded fraud committed by the 2nd respondent. See paragraph 17 of the plaint. There was no defence filed and so it was not contraverted by any pleadings. At page 199 R/A the trial Judge did not make express holding that it was fraud but he seems to have admitted that it was questionable. He did not make a specific finding of fraud. This was an error.

The evidence supporting fraud was not disputed or challenged".

It was the appellant's contention before the trial court that the power of attorney and the possession of the title deeds to the suit property were obtained through fraud. In his lengthy submissions of over a hundred pages dated 19th October, 2001, the appellant devoted pages 76 to 84 in narrating acts which constituted fraud and cited pertinent and relevant authorities to support the submissions.

Thus, at page 76 he contended;

> ***"In paragraph 18 of the plaint, the plaintiff alleged that the 1st and 2nd defendants conspired to defraud the plaintiff of his land and house. In paragraph 19 of the plaint, the plaintiff went ahead and required them (the defendants) to produce certain relevant documents. Once again, the 1st defendant did not produce them. Furthermore, they did not specify the circumstances that answered or challenged the plaintiff's allegations. In paragraph 2 of the plaint, the plaintiff alleged that the 1st defendant knew that the land title put in as security for the loan of Shs. 15m was fraudulently***

> ***and feloniously obtained from the plaintiff."***

Counsel for the appellant in the trial court had specified the particulars of fraud which included the deception by Sewanyana and the 2nd respondent regarding the dishonoured cheque, the fact that notwithstanding the knowledge that their promise that they would clear the appellant's debt owed to the Law Council was dishonoured, they nevertheless went ahead and utilized the power of attorney not for the benefit or liability of the appellant but for their own benefit.

Counsel cited the case of **Kajubi v. Kayanja**, 1967, E.A 301, in which the plaintiff had a power of attorney with authority to institute a suit on behalf of a company but instead instituted it in his own name and the High Court of Uganda dismissed the suit on the ground that the power of attorney did not authorize him to institute the suit in his own name. In that case, the court held that the proceedings were fundamentally and incurably irregular.

Counsel for the appellant cited a number of cases and analysed them in relation to situations where powers of attorney are either improperly or fraudulently obtained or used. These cases include **Byrant, Porvis and Bryant v. La Banque Du Penple,** 1893, A.C 170, **Sidpra v. Uganda Rehabilitation Development Foundation,** H.C.C.S No. 199 of 1993 (per Tsekooko, J, as he then was)

and **General Parts (U) Ltd v. Non-Performing Assets Recovery Trust** C.A. No.5 of 1999 (S.C and especially the lead judgment of Mulenga, J.S.C), **Dhramshi Vallabhji v. National & Grindley's Bank Ltd, 1964, Sudarilal Ltd v. Gussi County Council**, 1972 E.A. 253 and **Re McArdle**, 1951, ch.669.

For the respondents, Shonubi, Musoke & Co. Advocates filed a short written statement of defence in which the claims of the appellant are generally denied. Paragraph 5 of the statement states that the 1st, 3rd, 4th, 5th and 6th defendants would contend that the plaint did not disclose a reasonable cause of action. Paragraphs 6, 7, & 8 all simply deny that the defendants are liable. The Advocates submitted to court a list of authorities which they do not appear to explain or which do not relate to the pleadings. They thus avoid responding to the appellants allegations in any specific manner.

The issue then in ground 4 of this appeal is whether or not the first appellate court reevaluated all the evidence.

I will therefore consider and determine whether the learned Justices of Appeal adequately performed their duty. In his brief lead judgment, Twinomujuni, J.A. rightly in my opinion observed;

> ***"The duty of this Court as the first appellate court is very well settled. It is to***

evaluate all the evidence which was adduced before the trial court and to arrive at its own conclusion as to whether the findings of the trial court can be supported. See Kifamunte Henry v. Uganda, Criminal Appeal No. 10 of 1997 (unreported) S.C and Watt v. Thomas [1947] A.C. 484."

In his brief lead judgment, Twinomujuni, J.A. asked;

"(a) Whether the power of attorney was obtained from the appellant by fraud?

(b) Whether the mortgage on the appellant's land was executed by fraud?". Then the learned Justice continued:

"The evidence given by the appellant (PW3) was that sometime in October 1996, he had a debt of Shs. 1,000,000 to pay to the Law Council. He did not have the money. His friend and client, one Livingstone Sewanyana offered to bail him out provided he signed a power of attorney in favour of the 2nd respondent, Mars Trading Co. Ltd known as Kibuga Block 9 plot 534. The appellant executed the power of attorney as requested and surrendered the land title for Kibuga Block 9 plot 534 to Sewanyana. Appellant was given a cheque

of Shs. 1,000,000 in favour of the Law Council. On 4th November 1996, Sewanyana and two other Directors of the 2nd respondent returned to his home with the Bank Manager of the 1st respondent and land valuers. They took measurements of his properties at Kibuga Plot 534 and went away.

On 7th November, 1996, the appellant went to the 1st respondent Bank and consented in writing to a mortgage being executed in favour of the 2nd respondent using the power of attorney and the appellant's land title. It is these transactions that the appellant now says were fraudulent….. I would dismiss the appeal with costs to the respondent."

The other learned Justices of Appeal were in agreement with him.

With the greatest respect, it is my opinion that the learned Justices of Appeal did not evaluate the evidence in this appeal as they were required to do as a first appellate court. In the first instance, no reference or analysis is made with regard to the detailed pleadings, submissions and authorities presented by or on behalf of the appellant.

Ordinarily, this court is not required to reevaluate evidence after both the High Court and Court of Appeal have exercised their respective functions but in an

exceptional case where this Court finds that the exercise was not done or done adequately, this Court will do so. In my opinion, this is one such clear exception. For the reasons I have given, I would allow ground 4 of this appeal.

I will now consider ground 3 of the appeal.

I examined some aspects of ground 3 when discussing ground 4. I alluded to the appellant's submissions touching on this ground as advanced on behalf of the appellant. In my opinion, it was a condition precedent that Sewanyana and the 2nd respondent pay for and honour the discharge of the appellant's debt to the Law Council in the sum of Shs. 1,000,000. This was the only consideration for which the appellant was persuaded to part with possession of the title deeds of his land and residential house. It is for the same reason that he granted a power of attorney to the 2nd respondent. Once the consideration failed, the whole transaction collapsed.

In order to discharge that debt, the 2nd respondent's directors pretended to rescue the appellant from his debt but immediately they acquired possession of his property they abandoned the promise they had made to him and simply concentrated on depriving him of his land and houses for their own benefit. The power of attorney was not intended, and as the learned trial judge correctly

found, it is never intended to benefit the donee, his company or associates, none of which or whom is remotely connected with the interests or liabilities of the donor. This is a clear case of fraud and in my view, the appellant adduced sufficient evidence and particulars of the fraud to succeed in this appeal.

Once this consideration became known and turned out to be a fiction, the whole transaction involving the grant of the power of attorney and the release of the title deeds to the suit property collapsed. It does not matter that subsequently, both the power of attorney was registered and the title deeds of the suit property handed over to Mr. Sewanyana. In law such registration and possession have no legal or proprietary effect. Neither the grant of the power of attorney nor the possession of the title deeds could pass the title in the suit property to anyone else whether *bona fide* or otherwise. The legal and beneficial ownership of the suit property does not shift from the appellant.

The laws which secure and sustain ownership and interests in land are much more elaborate and protective than those which cover personal chattels which may be sold in markets and are subject only to market overt rules of commerce as exemplified by the written evidence of Mr.

Karibwende, Lands officer. To hold otherwise would mean that even stolen land titles or those inadvertently lost could be registered by thieves and diverse finders and then enable them to pass titles in the same way, which in my opinion, would lead to manifest absurdities and injustices.

The evidence shows that the original purpose and aim of the directors of the 2nd respondent in concluding a deal with the appellant was not to bail him out of the debt he owed to the Law Council but actually to utilize his land title and the grant of the power of attorney to transact their own business and that of the 2nd respondent in which the appellant had no interest or connection whatsoever.

On 6th August, 1996 Mr. Martin Wetaya, a director of Mars Trading Co. Ltd, the 2nd respondent wrote to the Bank Manager of Orient Bank Ltd, the 1st respondent in these terms:-

> ***"Dear Sir,***
>
> ***RE: APPLCIATION FOR A BANK OVERDRAFT.***
>
> ***We hereby submit our application to your office for an overdraft facility in the sum of Ug. Shs. 30,000,000 (Uganda shillings Thirty Million) to enable us fulfill a purchase order obligation and enable us expand our sales volume.***

In the course of our business, we have secured a purchase order to supply materials and services to National Water and Sewerage Corporation totalling to Uganda Shillings Forty Million only (Ug. Shs. 40,000,000).

The money is required urgently and we are offering a house and land valued at Uganda Shilling Eighty Million (Ug. Shs. 80,000,000) as security.

Attached herewith are copies of Trading Licence, 1995, Certificate of Registration, Articles and Memorandum of Association, current order, projected cashflow statement and copy of title deed with valuation report.

Your cooperation will be highly appreciated.

Yours faithfully,
Martin Wetaya
Director"

Apparently, the Bank appears to have been slow in responding to the application for financial facilitation by the 2nd respondent and the National Water and Sewerage Corporation expressed some concern as indicated in the letter of the supplies officer, Mr. Peter Mutenyo, of 20th November, 1996, Re L.P.6 No. 7 6409 thus;

"Reference is being made to your letter dated 19th November, 1996 in which you requested us to confirm the extension of the above mentioned contract period. As discussed, we have given you up to the end of December, 1996 to complete the work. The supervisor of works will submit his report before payment can be processed."

It would appear that the directors of the 2nd respondent had a habit of acquiring other people's property and either selling or mortgaging them for their own benefit as the letter of one L.M. Sewanyana, another director to their lawyer, M/S Shonubi – Musoke & Co., dated 29th October, 1998 shows:-

"I refer to the above matters. I beg to write to you as follows:

Mars Trading Company did not repay the loan as it was arranged because of the conditions which arose and were beyond their control. However, I have now received a power of attorney from the Administrator of the land situated at Luzira and comprised in Kyadondo Block 234, plots 789, 890,791,792,273,794,795,796,797,798 and 1343 with powers to sell the same and take part of the purchase price ---. I am ready to do

this for the purpose of solving the issue of the loan at the earliest opportunity and returning to Mr. Zaabwe's title at the earliest …. I have given powers to sell this land purposely to save Mr. Zaabwe's title."

No wonder then that Mr. Zaabwe's land and residential premises were acquired through the same device not to assist him clear his debt but to assist the 2nd respondent solve its own financial problems. There can be no doubt in my opinion that the shareholders and directors of and the 2nd respondent deliberately and schemingly committed fraud against the appellant.

I will now consider whether the 1st respondent was a party to this fraud.

The Managers of Orient Bank, the 1st respondent, in their anxiety to secure their payments from the 2nd respondent appear to have thrown diligence and caution of a prudent banker through the bank's window. It is they and their appointed valuers who went to inspect the suit property and discovered that the premises were owned and occupied by Mr. Zaabwe, a stranger to the negotiations to the mortgage deal, and yet they willingly or fraudulently agreed to enter and conclude the deal without satisfying themselves as to who this Zaabwe was. Interestingly, the defects in the mortgage terms are clearly visible.

The mortgage deed is drawn by M/s Shonubi, Musoke & Co. Advocates, as advocates & Solicitors and allegedly signed by M/S Mars Trading Co. Ltd as mortgagors without any indication that they are doing so as agents of the true owner, Mr. Zaabwe, which in my opinion was so essential that it should have been made clear on the face of the record. It is also signed by someone who is not identified but appears to have signed on behalf of Orient Bank, Ltd, the 1st respondent as the mortgagee. The Bank appears to have not noticed and rectified an essential clause 13 of the mortgage and did not have it signed. No wonder in his memorandum of 19/8/1999, the Registrar of Lands notifies all concerned:

> ***"It seems the transfer instrument itself is defective. The signature of the purchaser was not attested as the law requires. In light of the paragraphs 2, 3 and 4 above, we are of the opinion that the transfer should be rejected and the Advocates advised to remedy the defects".***

This is further evidence that the purchaser of the title cannot claim to have been a *bona fide* purchaser for value without notice.

In his affidavit of 12th of July 1999, Mr. Satya, counsel for the subsequent buyer of the suit property stated that he did not know why the plaintiff gave a power of attorney or surrender his title deeds yet the same Manager was willing to sign the mortgage and dispose of the plaintiff's land and house without knowing in what capacity the mortgagors had acquired that property.

However, more importantly, on the 21st November, 1996, Mr. Bikas Roy, the Deputy Managing Director of Orient Bank wrote to M/S Mars Trading Company Ltd, guaranteeing that the land with residential property situated at plot 534 Block 9 of Kagugube Hill, Makerere, Kampala District belonging to Mr. Frederick Jackson Katonono Zaabwe, whose mortgage **will continue as long as the dues to the bank remain unpaid** (emphasis mine) appears to have been totally ignored by the 2nd respondent in their hurry to dispose of the suit property.

Not only was the power of attorney obtained for an improper motive by the directors of the 2nd respondent but it was used for an improper purpose with the knowledge and connivance of the 1st and 2nd appellants.

The **Carta** dictionary defines and describes a power of attorney in the following terms:

> ***"In law, a written document, certified by a notary public, designating a person or party as an agent empowered to act for another person (principal) in a legal capacity. A general power of attorney authorises the named agent to act on behalf of the principal or signer in any legal circumstances, whereas a special power of attorney specifies and restricts the province of an agent's responsibility. Most frequently, people will give another person power of attorney when they are ill or for other reasons are unable to conduct their on affairs, or when they are absent from home or business for a long period of time. A power of attorney is revocable under normal circumstances and becomes void on the death of the principal."***

Power of attorney creates a fiduciary relationship between the donor or the principal and the donee of the power or the agent. In law, the consequence is a voluntary relationship between the two parties whereby one, the agent is authorized by express or implied consent to act on behalf of the other called the principal. The authorized acts of the agent are considered to be the acts of or in an implied form, the ostensible acts of the principal who is entitled to the benefits or responsible for the liabilities, if any, arising from the decisions, acts and consents of the

agent as the holder of the power of attorney. The agent may be paid or receive a commission for the proper exercise of the power of attorney but may not exercise it to his or her own personal advantage.

In my opinion, the law does not permit a grantee of a power of attorney to derive personal benefits directly from its exercise or the discharge of liabilities whether personal or corporate when they are not connected with the interests or business of the grantor unless it expressly provides so. In this case, there was ample evidence adduced and submissions made by or on behalf of the appellant to show that the directors of the 2nd respondent indulged in deception and fraud while the managers of the 1st respondent knew of the fraud. The 2nd respondent used the power of attorney to benefit itself and its shareholders. The following authorities were cited in support of the appellant's submission. **Mattaka v. R.** 1971, E.A.499, **Suleman v. Azzam**, 1958, E.A.533, **Elliahoo M. Cohen v. Syed Ali Abdulla E.P Safi and Brothers,** 1956, 23, E.A.C.A 166 and **Kajubi v. Kayanga,** 1967, E.A.301.

In my view therefore, both the 1st and 2nd respondents through their respective managers and directors participated in or were privy or knowledgeable about the fraudulent transactions which adversely affected the

interests of the appellant in the suit property and they are therefore severally and jointly liable for the same.

The next issue to be determined is whether the other respondents participated in the acts of fraud. My understanding of the evidence is that Allan Shonubi was not only an advocate for Orient Bank but acted for all the defendants. Mr. Allan Shonubi is the senior partner in the firm of Shonubi & Musoke & Co. Advocates. The first remarkable phenomenon is that it would appear that Shonubi & Musoke Co. Advocates who represented the 1st, 3rd, 4th, 5th and 6th respondents did not take the claims of the appellant seriously. Thus, notwithstanding the plaintiff's elaborate and detailed plaint containing serious allegations against the respondents, the respondents replied together by simple and general denials of liability. The second respondent did not even bother to offer any defence.

On the other hand, the record of proceedings shows that the firm of Shonubi & Musoke & Co. Advocates and its lawyers were not only active participants in most of the transactions in dispute but Mr. Alan Shonubi is or was actually the Secretary of 1st respondent. It was on the advice of Shonubi & Musoke Co. Advocates that the illegal mortgage and the ultimate disposal of the suit property were negotiated and executed.

I have already held that the power of attorney does not authorize its holder to use it beneficially and for own interest and that possession of the suit property was obtained fraudulently, yet it was Shonubi & Musoke & Co. Advocates who were the legal representatives of the other respondents.

Besides being the Secretary to the Orient Bank, Mr. Allan Shonubi was apparently also counsel for the same bank. His status as counsel for the bank is disclosed in the affidavit of the Senior Manager of the 1st respondent, Mr. I.B.M Satyana Rayan. Mr. Alan S. Shonubi as both counsel and secretary to Orient Bank would have been aware of a report prepared by the same senior manager dated 11th November, 1996 in which he stated *inter alia;*

> ***"Security offered earlier being a land with small houses at Ndejje was inspected on 8/10/1996 and found to be not satisfactory. Upon informing them, they arranged for an alternative security in Kampala which was inspected on 4/11/1996. It is a residential building not fully completed, but nevertheless occupied by the owner, Mr. Frederick Jackson Katono Zaabwe, who is a lawyer by profession."***

It is therefore inconceivable that in the preparation of the mortgage between the 2nd respondent and the 1st respondent of which Allan Shonubi is or was secretary and counsel, the fact that Zaabwe was the owner should have been ignored altogether.

The same oversight or deliberate omission appears to have occurred when Orient Bank Ltd was purportedly illegally selling appellant's property to one Ali Hassen. It is obvious that neither Mr. Alan Shonubi nor his firm Shonubi and Musoke & Co. Advocates cared to advise Orient Bank Ltd as to its power to sell the suit property. As Edward Karibwende stated;

> ***"The bank released the mortgage which would otherwise give them power to sell. Releasing the mortgage ahead of the transfer deprives them of the power to sell …. The consideration stated in the transfer instrument (Shs. 35 million) is much higher than the consideration slated in the consent to transfer form (Shs. 30 million) …. It seems the transfer instrument itself is defective. The signature of the purchaser was not attested as the law requires."***

Despite this statement of a Lands Officer and my findings on the two grounds of appeal, Shonubi, Musoke & Co.

Advocates, Counsel for the 1st, 3rd, 4th, 5th and 6th respondents maintain in their submissions that;

> ***"It is inconceivable that the power was obtained by fraud, that the mortgage was made pursuant to the power of attorney, that the authorities cited by the appellant under ground 1 are irrelevant. That arguments being raised by the appellant are purely technical and intended to mislead the court. The mortgage deed was valid, the persons who signed the mortgage are well identified by DW2, none of the parties contested the validity of the mortgage, no fraud was proved, the appellant was required to prove his case against the 2nd respondent although no defence was filed. This he failed to do, the purchaser, Mr. Alwi was an equitable owner and his title was impeachable."***

It is very difficult to take these summarized statements seriously and many of them are erroneous and unsubstantiated.

I find that at best, the firm of Shonubi & Musoke & Co. Advocates was negligent or incompetent. At worst, some of its lawyers either participated in or were aware of the fraudulent intentions of the directors of the 2nd respondent

and the prior knowledge possessed of the managers of the 1st respondent before they effected both the mortgage and the sale of the suit property.

In my view, the disposal of grounds 3 and 4 disposes of this appeal. I would allow this appeal and award costs to the appellant against the 1st, 2nd respondents in this court and in the courts below.

I concur in the orders proposed by my learned brother Katureebe, J.S.C.

Dated at Mengo this 10th day of July 2007.

G.W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT