THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CORAM: TSEKOOKO, KATUREEBE, KITUMBA, TUMWESIGYE AND KISAAKYE JJ.S.C.)

***CIVIL APPEAL NO.* 22 OF 2010**

BETWEEN

1. HOUSING FINANCE BANK LTD

(FORMERLY KNOWN AS HOUSING FINANCE CO (U) I ::::::::::::APPELLANTS

2. SPEEDWAY AUCTIONEERS

AND

EDWARD MUSISI:::;;::;;;;;;::::::::::::::RESPONDENT

[Appeal from the decision of the Court of Appeal of Uganda (Engwau, Twinomujuni and Kawuma JJA) dated 26th August, 2010, *in Court of Appeal Civil Appeal No* 25 *of 2004]*

JUDGMENT OF KITUMBA JSC

This is a second appeal to this Court against the judgment of the Court of Appeal dated 26/08/2010 in Civil Appeal No 25 of 2004 which arose from High Court Civil Suit No 27 of 2002 in which the respondent was

the plaintiff and the appellants were the defendants.

The following is the brief background to this appeal.

Edward Musisi herein after referred to as the respondent, in 1995 borrowed a sum of Uganda Shillings forty million (40,000,000/=) from

the then Housing Finance Company (U) Ltd now known as Housing

Finance Bank Ltd and in this judgment will be referred to as the first appellant.

The two parties executed a mortgage deed, Exhibit P2, wherein the terms of mortgage were set. The money was to be paid within ten (10) years with interest. The respondent was to pay the debt by monthly installments. The respondent mortgaged his property comprised in Kibuga Block 28, Plot 256, situated at Makerere Kavule to the 1st appellant. The respondent was often in arrears on payment of his monthly installments.

On two occasions when the respondent was in arrears, the 1st appellant instructed Speedway Auctioneers, the second appellant, to sell the respondent's property.

The 1st appellant advertised in newspapers that the respondent's property would be sold on 18th January, 2002. In the early morning of that day, before the actual sale, the respondent made some payments into the bank account he held with the first appellant. Those payments were duly accepted and receipted by officials of the 1st appellant.

The respondent together with one Kaggwa, PW2, went to the offices of the second appellant taking with them receipts from the 1st appellant showing that the respondent had paid shillings three million three hundred thousand only (3,300,000/=). The respondent presented the receipts and a letter he had written to the second appellant and stated that he had paid the money due and owing from him to the first appellant. The respondent requested that his property should not be sold. The second appellant refused to take the letter and receipts. He referred the respondent to one Michael Mugabi, DW 1, the legal officer of

the first appellant, who was present at the auction. He, too, rejected the letter and the receipts. DW1 said that the auction should go on and the buyer, one Dorothy Katantazi from Med-Net was already at the auction and ready to pay. The respondent put the letter and the receipts at the office table in the 2nd appellant's office. DW 1, instructed

the second appellant to sell the property and he complied. The property was sold to the respondent's tenant M/S Med-Net at shs 170,000,000/=. The respondent still objected to the sale and instructed his counsel to file a suit against both appellants challenging the sale that it was unlawful.

Respondent's counsel filed the suit in the High Court. In the plaint the respondent averred that the sale was unlawful in the light of the Mortgage Decree and the mortgage deed. He prayed court to make the following orders, that the sale was unlawful, prohibition of the transfer of the land by the appellant, return of the land title unencumbered after settlement of the loan, general damages and costs of the suit.

In their written statement of defence the appellants averred that the sale was lawful and that the respondent was not entitled to any of the 25 orders sought.

During the trial the following issues were framed:

1. ***Whether the plaintiff was* in *default* so *as* to *warrant a sale of the mortgaged property.***

2. ***Whether the sale of the mortgaged property was lawful. 3. Whether the*** *plaintiff* is ***entitled* to *the remedies sought.***

The learned trial judge answered all the issues in the negative and dismissed the respondent's suit with costs. The respondent appealed to the Court of Appeal on the following grounds.

1. *That the learned trial judge erred* **in** *law and fact* **in** *finding that* **at** *the time of the sale of the mortgaged property comprised* **in** *Block* **28** *Plot* **256** *Makerere, the appellant was in arrears by default whereby the entire loan fell* ***due.***

2. ***That the learned trial judge erred*** **in** ***law and fact in holding that the sale*** *of the* ***mortgaged property was lawful.***

3. That the learned judge erred in law and fact in failing **to** ***consider the equitable principle of redemption.***

The learned Justices of Court of Appeal framed the following issues for determination.

1. *Whether on 18th January 2010 the appellant was in default of any payments* **on** *the mortgage* **to** *warrant* **a** *sale of the mortgaged property:*

2. *Whether the sale of the appellant's property* **on** *18th January 2002 was lawful.*

3. ***Whether the trial judge properly considered the appellant's right of the equity of redemption.***

The learned Justices of the Court of Appeal on re-evaluation of the evidence on record allowed the appeal, ordered the release of the title to the respondent. The appellants were ordered to pay general damages of shs. 100,000,000/= and costs of the suit in both courts.

Dissatisfied with the judgment of the Court of Appeal the appellants have filed their appeal to this Court on eight grounds.

The parties to this appeal filed written submissions through their advocates *M/*s Nangwala Rezida & Co, Advocates for the appellants and

M/ s Tumusiime Kabega & Co, Advocates for the respondent. They argued all grounds of appeal separately and consecutively. In this judgment I will handle grounds 1 and 2 jointly followed by grounds 3, 4,5,6,7 and 8.

Grounds 1 *and* 2 *read:*

1. ***The Learned Justices of Appeal failed*** **to** ***properly evaluate all the evidence adduced and hence erred in holding that at the time of sale of the suit property the respondent was not in default of his mortgage repayments*** **to** ***justify the sale of the property.***

2. ***The Learned Justices of Appeal erred in holding that there was a waiver by the Appellants of the 1st Appellant's right*** **to** ***sell the suit property.***

Appellants' counsel complained that the Court of the Appeal failed in its duty to re-evaluate the evidence and to hold that there was a waiver by the 1st appellant to sell the suit property. Counsel criticized the Court of Appeal that it only took into consideration the evidence of the respondent, PWl, that he owed the 1st appellant only shs 4,744,316.76 and not shs. 31,497,768/=. He submitted that if the learned Justices of Appeal had properly analysed the evidence, they would have found that the respondent was in default of his mortgage repayments which justified the sale of his property. Counsel contended that where

payment of the mortgage debt is by installments, the mortgagee has the right to sell when the mortgagor fails to pay any of the installments. In support of his submissions he relied on ***Payne Vs Cardiff. Rural Urban Council*** [1932] K.B 254.

He further submitted that the learned Justices of Appeal were wrong to hold that by accepting the money, the 1st appellant had waived its right to sell the respondent's property. Counsel argued that for waiver to be effective it must be established by express or implied contract. He cited the authority of ***Nurdin Bandali Vs Lombark Tanganyika Ltd [1963J EA 304*** in support of his submission.

The respondent's counsel supported the decision of the Justices of Appeal. He submitted that on 31st December 2001, the respondent was given a final bank statement, Exhibit P14, indicating that his outstanding balance was 4,744,316.76 which he duly paid. According to paragraph 7.2 of the mortgage deed, Exhibit P2, the receipt of the money by the 1st appellant or its officials was effective discharge of the respondent. He contended that, therefore, the case of the ***Payne Vs Cardiff. Rural Urban Council*** (Supra) cited by the appellants is distinguishable from the instant appeal.

These two grounds of appeal were treated by of the Court of Appeal "as issue No 1. The Court of Appeal in its judgment held that the respondent had paid the money according to the final statement as at 31/12/2001. Accepting the money that was due before the auction was a waiver by the first appellant. In reaching their decision the learned Justices of Appeal only considered clause 7.2 of the mortgage agreement which provides:

7.2 *"The receipt of the company* **or** *any of its officers for any money paid* **to it** *by virtue of this mortgage shall effectively discharge the person paying the same there from and from being concerned* **to** *see* **to** *the application thereof".*

It is accepted that the respondent had paid to the first appellant shs. five million three hundred thousand (5,300,000/=) by the 18th January, 2002 and the money had been accepted and receipted by the cashier of the bank during and in the course of their ordinary banking business. This was the money the respondent owed the first respondent as arrears. According to the loan agreement, Exhibit P2, the first appellant had the right to demand for payment of the whole amount of the loan and interest once the respondent defaulted in payment. The first appellant was not entitled to payment of the arrears only.

The Statutory Notice dated 25th May, 2001 indicated that the sum which was payable in respect of principal and interest is Uganda shs. Thirty one million four hundred ninety seven thousand seven hundred sixty eight (31,497,768/=) plus costs and further interest at the rate of 15% per annum. According to the advertisement which was put in the New Vision news paper of 11th January, 2002 the respondent had to pay all the monies due and owing to the 1st appellant before the auction date which was 18th February 2002. The respondent failed to pay the money and his property which he had given to the first appellant as security was, therefore, lawfully sold.

With respect, I disagree with the learned Justices of Appeal that the 1st respondent had waived his right to sell the security by accepting the

respondent's money. I appreciate the submissions by appellant's counsel that for a waiver to be effective it must be express or implied by contract. The authority of ***Nurdin Bandali Vs Lombark Tanganyika Ltd*** *(supra)* was a case of hire purchase and not mortgage but the principles established therein are applicable to the instant appeal. In

that case it was a hire purchase agreement. According to terms of the agreement prompt payment was required. Late payment was received and accepted by the hirer. The hirer used to pay late his installments and would be reminded on several occasions to pay. According to clause 9 of the hire purchase contract, relaxation forbearance extended to the hirer would not constitute, inter alia, waiver. The hirer was late in his payments as usual. Though the owner of the car had promised to accept late payment he sold the car to another person. The hirer paid money in the bank, demanded to get possession of the car and claimed, inter alia, that there was a waiver.

The Eat African Court of Appeal held that in view of the express clause that the hirer had to pay on time and the fact that the respondent had on a number of occasions fore bore the right to exercise its right of repossession that did not amount to waiver. The Court of Appeal stated:

"A *waiver* **is** ***based on a contract express*** **or** ***implied between the parties. Thus*** **it** ***arises from a term expressed*** **or** ***implied of a contract and before any such term can exist a valid contract must be established. If*** **it is** ***found that a contract*** **is** ***established and that*** **it** ***contains such a term, then that term like any other term in*** **a** ***contract may found*** **a** ***cause of action. "***

The Court of Appeal quoted with approval the following statement by Lord Cranworth in *Dacney Vs London, Chatham and Dover Railway Co.* (1867), L.R. 2H.L 43, 60 thus:

"When parties, who have bound themselves by a written agreement, depart from what has been so *agreed on in writing,*

and adopt some other line of conduct, it is *incumbent on the party insisting on, and endeavouring* to *enforce, a substituted verbal agreement,* to *shew, not merely what he understood* to *be the new terms on which the parties were proceeding, but also that the other party had the same understanding that both*

parties were proceeding on a new agreement, the terms of which they both understood."

In the instant appeal the respondent failed to pay the installments in time. The 1st appellant wrote to him several reminders to meet his 20 obligation. That did not constitute a waiver of their right to foreclose.

The evidence of Mugabi DW1 is very instructive on the matter.

"This statement runs from 29/10/2q02. The balance column shows that no any time was Musisi in credit. The balance should 25 *be zero if he services the loan punctually. He was always in default. The consequence according* to *a mortgage deed* is *that the whole amount comes due and payable immediately. By default* it *meant anyone month's installment falling due and* is *not paid. The rationale* is *that we rely on borrowed funds and we have* to *remit installments, and any default by a customer destabilises us.* It is *my evidence that we also have* to *meet monthly obligations. Musisi's property was sold.* It is *unfortunate if he claims he was not given notice. We have given*

him several notices. We even sent notice of foreclosure and demand. *Right from* ***the inception*** *of the* ***mortgage he was always on default."***

The authority of ***Payne Vs Cardiff Rural Council*** (Supra) is not at all distinguishable from the instant appeal, as counsel for the respondent has submitted. That authority lays down the legal principle that in case where mortgage money is payable by installment the power of sale is exercisable when an installment of a mortgage has become due and payable but has not been paid.

With due respect to the learned Justice of Appeal, they failed to properly evaluate the evidence. They simply relied on clause 7.2 of the mortgage. Additionally they did not apply the correct legal principles to the facts, Grounds 1 and 2 succeed.

I now consider ground 3 *which reads:*

The Learned Justices of Appeal erred **in** ***holding that the statutory notice was not served on the Respondent.***

Submitting on this ground, appellants' counsel contended that the Justices of Appeal erred to find that the Statutory Notice was not served on the respondent. Counsel argued that the Statutory Notice was received by the respondent and duly acknowledged.

In reply, counsel for the respondent supported the finding of the Court of Appeal. He submitted that Statutory Notice Exhibit D.S was sent to the wrong address. He submitted further that the Statutory Notice Exhibit D **11** dated **11**th April 2001 which the appellants were trying to

rely on, to justify the sale was a forgery and the respondent did not agree with it because his indebtedness to the bank was only 4,100,000/= and not what was stated in that Statutory Notice.

The Court of Appeal held that before the advertisement for the sale of the property the demand notices and notice of foreclosure were posted 10 to the wrong address. The Court of Appeal found that the required Statutory Notice was never served on the appellant.

I have perused the record and observed that the respondent's address which is given in the mortgage deed is P.O.Box 16518 Kampala. Exhibit **D11** dated 25/05/2001 and the Statutory Notice were sent to the right address. Granted that other notices of demand were sent to the wrong address the Statutory Notice which is relevant to this dispute was sent to the right address. The respondent, however, disputed the amount given herein exhibit D 13. The learned Justices of Appeal were, with due respect not, therefore, correct to find that the respondent did not receive the Statutory Notice and the Notice of Foreclosure.

This ground succeeds.

I now turn to ground 4 *which reads:*

The Learned Justices of Appeal erred* in *holding that the 1st Appellant and the Respondent's tenant had* a *prior common interest* to *dispossess the respondent of the mortgaged property

Counsel for the appellants criticized the learned Justices of Appeal for finding that there was evidence of prior common interest between the 1st appellant and the respondent's tenant to dispossess the respondent of his property. He argued that Exhibit 24 the letter dated 14th November 2000, which the 1st appellant wrote M/S. Kakooza Kawuma

& Co Advocates who were the tenant's lawyer could not be interpreted as common interest. Advising a tenant to bid for the property when advertised was not an offer of sale of the property to the tenant. He contended that at the auction there were many bidders because there were other properties for sale and the evidence of the 2nd appellant clearly shows that in, Exhibit D16, there were 3 bidders for the property.

In reply, counsel for the respondent supported the Court of Appeal's finding that there was connivance between the 1st appellant and respondent's tenant Med-Net to dispossess the respondent of the suit property. Counsel quoted from Exhibit D13 a response to Exhibit D11 wherein the respondent complained that the 1st appellant was secretly dealing with his tenant. He stated that he suspected that the bank had been influenced to put up his property for sale because of the influence of M/S Kakooza, Kawuma and Company Advocates who were the lawyers for his tenant.

The respondent's counsel further contended that the 1st appellant used to send the notices to the wrong address so that they would not be received by the respondent.

Additionally, the 2nd appellant did not advertise the property for sale as is required by section 2 of the Auctioneers Act (Cap 270) but it is the 1st appellant instead who advertised the sale. Counsel argued that connivance between the 1st appellant and the respondent's tenant was revealed further by the fact that the suit property was valued at Uganda shillings Three hundred million (300,000,000/=) in 1995 before the respondent was given the loan. In 2002 the same property was sold for one hundred and seventy million only (170,000,000/=). According to

counsel, this showed that the 1st appellant and the respondent's tenant had a prior common interest to dispossess the respondent of the mortgaged property.

The Justices of the Court of Appeal held that there was connivance between the 1st appellant and the respondent's tenant Med-Net to disposes the respondent of the mortgaged property and some of the reasons they gave in their judgment as evidence of the connivance are as follows:

The property was sold to a known tenant of the appellant M/s Med-Net, in spite of the fact that the appellant had complained that he had learnt of connivance between this known purchaser, his tenant and the 1st respondent to deprive him of his property. The tenant would, withhold from the respondent vital information regarding the operations of his account and the tenant between the two in areas where the 1st appellant showed interest.

The 1st appellant had even advised the purchaser to bid for the respondent's property when advertised and this was well before the 1st respondent advertised it.

On the 18th January 2002 at the 2nd appellant's offices where the auction sale was conducted, it was only Med-Net who offered a bid for the property. This was, at shs 170,000,000/= of which shs 17,000,000/= was supposed to be paid as deposit on the purchase price although no evidence of such payment is on record. The same property had been valued at shs 300,000,000/= at the time the loan it secured was extended to the appellant. According to the Justices of Appeal's opinion the 2nd respondent was reckless in selling

respondent's property whereas he should have used proper auctioning skills to protect the interests of both the mortgagor and the mortgagee.

I have further carefully considered the evidence on record. According to Exhibit D 16 which is the letter dated 18th January 2002 which the second appellant wrote to the mortgage manager of the 1st appellant, there were three other people who bid for the suit property.

With due respect to the Justices of the Court of Appeal and counsel for the respondent there is no evidence of connivance between the 1st appellant and the bidder M/ s Med-Net. There is evidence on the record of appeal especially from Exhibit D 8 the letter dated 15/08/2000 written by Kakooza Kawuma & Co. Advocates to the respondent that he is the one who introduced M/s Med-Net to the first appellant as his tenant. The agreement was reached between the respondent, the 1st appellant and M/S Med-Net. The tenant paid to the respondent rent for three years up front. A sum of shillings 17,231,311/= down payment was paid to the 1st appellant in order to help the respondent settle his indebtedness. The, balance of the rent money was used by M/S Med-Net to renovate the suit premises. The agreement was that the respondent was to pay the 1st appellant shillings four million (4,000,000/=) every six months and present the vouchers as evidence of payment to M/S Kakooza & Kawuma Co. Advocates lawyers for the tenants. According to the agreement between the three parties the respondent was supposed to retire the loan within the first term, of the tenancy. On the contrary the respondent was uncooperative.

The arrangement was that the respondent would then continue to pay his indebtedness on time but he did not do so. M/ s Med-Net had paid

the money for rent up front and was interested in transacting its business in the respondent's premises. The 1st appellant was desirous of recovering its loan money. The advice by the first appellant to M/ s Med-Net to put pressure on the respondent to pay his loan in installments and to bid for the property if and when it is advertised for sale cannot be taken as connivance between two to deprive the respondent of his property.

According to the letter exhibit D 16 which the 1st appellant wrote to the mortgage manager of the 2nd appellant, it was not only M/s Med-Net who was present at the auction and bid for the property. There were other participants namely, Kiddu Lwanga who bid for 16.7m/= and H. Kasumba who bid for 100m/ = in writing.

Additionally, there were other people at the auction because a part from the respondent's property there were other properties, about thirteen in number, which had been advertised for sale on that day as per New Vision news paper of 11th January, 2002. Exhibit D 15 cheque No. 106447 in the' sum of shillings One hundred fifty three million (153,000,000/=) was attached to the letter from the 2nd appellant to the mortgage manager of the 1st appellant. The cheque was dated 18th January 2002. Granted that the said letter indicates that the amount paid is shs 17,000,000/= but the cheque attached is more money, I do not find anything wrong with it. A bidder at the auction who is able may pay more than ten percent of the purchase price even if the auctioneer had demanded that 10% only should be paid immediately and the rest to be paid within fourteen days.

The property was sold at shs l70, *000,000/=* and that has been raised by counsel for the respondent as evidence of collusion. I am not inclined to take it as such. In my view, that was the price which the auctioneer could realize at that auction since the two other bidders at the action bid for much less.

I have failed to appreciate the complaint by the respondent's counsel that it is the 1st appellant and not the 2nd appellant who advertised the suit property for sale. According to the advertisement in the New Vision newspaper dated 11th January, 2002, it is clearly stated that:

The 1st appellant intends to sell the suit property by public auction through *M/S* Speedway Auctioneers and Property Managers (the 2nd appellant).

I am unable to imply collusion from the above.

Ground 4 therefore succeeds.

I now consider ground 5 *which reads:*

Against the weight of evidence, the Learned Justices of Appeal erred in holding that an employee of the 1st Appellant effectively took over the conduct of the auction of the mortgaged property.

Counsel for the appellant criticized the Justices of Appeal for finding that Michael Mugabi, DW 1, took over the conduct of sale whereas in his evidence the witness explained that there were other properties that were being sold in which the 1st appellant had interest. He was at the auction to safeguard the 1st appellant's interest.

I appreciate this contention by the appellant's counsel. PWI testified that when he went to auction he presented his receipts, bank

statement and letter to DW2 and told him that he had paid up. DW2 replied that he could not take instructions from him.

He pointed at Mugabi seated next to him. In my view, that was correct because it was the 1st appellant who had instructed him to conduct the auction. The respondent handed the documents to Mugabi. He refused to take the documents because the auction was proceeding. I appreciate that the auction was already in process and DW2, the auctioneer, could not take instructions from the respondent. His instructions were from the 1st appellant. Mugabi DWI testified that he was there to protect the 1st appellant's interests. There is no evidence on record that he is the one who hit the hammer or made an agreement with the bidder. It is not, therefore, correct to conclude that Mugabi, DW 1, took over the auction.

This ground has merit and therefore succeeds.

I now deal with ground 6 *which reads:*

The Learned Justices of Appeal erred* in *holding that the Respondent had not lost his equity of redemption* at *the time of* *sale* *of the mortgaged property.

This was the third issue in the judgment of the Court of Appeal. Appellants' counsel faults the Justices of Appeal for holding that the respondent had not lost his equity of redemption at the time his property was sold.

Appellant's counsel contended that by the time the suit house was advertised the respondent had not paid the whole amount. The mortgage debt was not, therefore, discharged. He argued that as the

respondent had not paid the whole amount due, he had lost his equity of redemption.

Respondent's counsel disagreed and supported the holding of the Court of Appeal that the learned trial judge did not consider the respondent's right of equity of redemption and contended that clauses 11.1 and 12.2 fettered the respondent's equity of redemption.

Counsel submitted that equity has always regarded the right to redeem the land by payment of the debt and interest as an inviolable right of the mortgagor which cannot be taken away by any provision to the contrary in the contract. Any provision to that effect would be struck down as a clog on the equity of redemption and, therefore, rendered void. In support of his submission counsel relied on the authority of ***Knights Bridge Estates Trust Ltd Vs Byrne*** (1939) ICH 441.

The learned Justices of the Court of Appeal faulted the trial judge for finding that the respondent had lost his right of the equity of redemption at the time his property was auctioned.

They held that by the time the sale of the respondent's property is stated to have taken place, he had paid up all the monies due from him to the 1st appellant and had been effectually discharged from any liability to the 1st appellant. The sale was unlawful. The trial judge was in error to assume that the applicant had lost his right of the equity of redemption, because no event had occurred to justify the loss by the appellant of his right of the equity of redemption. Additionally, clauses 11. 1 and 12.2 provide for denying the respondent his right of the equity of redemption even after he would have paid all the arrears due from him to the 1st respondent, were enforceable against the appellant in the circumstances of this case. The Justices of the Court of Appeal

relied on what ***Lindey M R said in Stanly Vs Wilde*** [1899]2/ch 474.

His Lordship stated:

> ***"The principle is: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment of or discharge of such debt or obligation, any provision to the contrary notwithstanding ... any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and therefore void A "clog" or "fetter" is something inconsistent with the idea of "security".***

This rule of equity is for the protection of a mortgagor against unscrupulous or unfair treatment by a mortgagee. It is simply summarized in the well known sentence "once a mortgage always a mortgage."

They distinguished the case of ***Nurdin Bandali Vs Lambork Tanganyika Ltd*** (Supra) cited to court and relied on by the appellants. They held that the ***Nurdin Bandali*** case (supra) arose out of a hire purchase agreement, whereas this case is a mortgagor-mortgagee relationships. According to the Justices of the Court of Appeal the two transactions were fundamentally different in law.

The Court of Appeal held that the 1st appellant therefore, could not invoke clauses, 11.1 and 12.2 of the mortgage deed against the appellant. To allow clauses to extinguish the respondents proprietary

rights in his property would amount to placing a clog on the appellant's right of the equity of redemption. It would render the right illusory.

The clauses which the Court of Appeal held to be a clog on the respondent's right of redemption provide:

> **11.1** *"No granting of time* **or** *indulgence of any variation of waiver* **or** *release of the terms of hereof shall prejudice the strict enforcement of all* **or** *any of such terms by the Company against the Borrower as if such time indulgence variation waiver* **or re** *lease had not been made."*
>
> *"The giving of the time* **to** *the Borrower or the neglect* **or** *forbearance of the company in requiring* **or** *enforcing the terms hereof as* **to** *payment of the moneys hereby secured or otherwise* **or** *any variation* **or** *other dealing between the Company and the Borrower shall not in any 'way prejudice or affect this security* **or** *the joint and several covenants of the Borrower and the Surety herein contained or deemed and as between the Company and the Surety* **is to be** *considered a principal debtor for all moneys and obligations secured hereby."*

The learned Justices of the Court of Appeal, with due respect, erred in fact and law when they held that the respondent owed to the appellant only the arrears. I have indicated in my discussion regarding grounds

1 and 2, when the respondent failed to pay his installment the whole amount of the loan immediately became due and payable. The 1st appellant demanded for payment of that amount. According to the respondent responses in exhibit D.13 and D.14 he admitted default and only insisted on payment of the arrears.

Osborn's Concise Law Dictionary Eight Edition at page 72 defines clog on equity of redemption as follows:

***The doctrine of equity that no mortgage deed may contain any stipulation or provision fettering or impending the mortgagor's right to redeem e.g. which unduly delays the time for redemption or which is unfair or unconscionable or which is inconsistent with or repugnant to the right to redeem. Collateral stipulations or advantages were formerly void as an evasion of the usury laws, but they are now valid provided they do not clog** the equity.*

According to the simple definition above quoted the clauses complained of are not a clog on equity of redemption. **In** my view, they do not render the suit property practically irredeemable. The respondent just failed to pay the whole amount due and lost his equity of redemption.

The respondent bank was supposed to be paid its money on time. There was no waiver as I have indicated above. The respondent bank was simply lenient to its difficult borrower. He had the right to redeem his property by paying all the loan amount. He was in fact aware of that and this is shown according his prayer in his plaint *"return of the land title unencumbered after settlement of the loan"*. After sale of the mortgage property the first appellant should have recovered the

outstanding balance, interest and costs and given the balance to the respondent.

Ground 6 *succeeds.*

I consider ground 7 *which reads*

The Learned Justices of Appeal erred* in *setting aside a concluded sale and ordering a return* to *the Respondent of the Certificate of Title free from any encumbrance, against the weight of evidence.

Appellant's counsel complained that the learned Justices of Appeal erred in setting aside a concluded sale and ordering a return to the respondent of a Certificate of Title from any encumbrance.

Counsel argued the purchaser of the property Med - Net was not a party to the suit that was instituted by the respondent and its rights could not be taken away without a hearing.

According to clause 7.3 of the mortgage deed the purchase of the mortgaged property is cleared from any irregularity that occurs before the sale. The judgment was in personam and could not, therefore, affect a third party. He contended that the sale agreement which the Court of Appeal ignored on the ground that no stamp duty had been paid was admitted in evidence by consent of both parties. Besides, section 3 of the Stamps Act provides for payment of stamp duty in respect of transactions constituted by a series of documents.

In the instant appeal the main document was the transfer form. Counsel contended that there were no irregularities which could lead to cancellation of the sale.

Respondent's counsel supported the holding of the Justices of the Appeal. He submitted that according to the evidence on record there are contradictions and irregularities in the sale leading to the conclusion that there was no valid sale. He submitted Exhibit D 18, the sale agreement was a *forgery* made as an afterthought to defeat the respondent's interest in the security mortgaged to the first appellant.

In their judgment the Justices of the Court of Appeal found that the irregularities in the sale were fundamental. In their view, those problems invalidated the sale. The sale agreement did not bear endorsement that stamp duty had been paid in accordance with section 42 of the Stamps Act. No transfer form was produced. The trial judge's finding that stamp duty would have been paid at the time of transfer was, in their view, speculative. The Certificate of Title was not tendered in evidence which would have been conclusive evidence that the property was bought and transferred in the names of the third party.

Additionally, the Court of Appeal found that and I with respect disagree, that there was ample evidence of connivance between the first appellant and Med-Net over the intended deprivation of the respondent of his property.

It is appreciated that there were irregularities in the sale agreement.

However, that does not mean that the sale agreement was a *forgery* made in order to defeat the respondent's interest. The stamp duty for the agreement of sale had not been paid in accordance with section 42 of the Stamps Act. That notwithstanding the land could not be

transferred into the names of the buyer without paying the stamp duty and other taxes connected with land transfers. I do not, therefore, agree with the holding of the learned Justices of the Court Appeal that the trial judge's holding that stamp duty would have been paid at the time of transfer of the land was speculative.

Failure to tender in evidence a certificate of title transferred into the names of the buyer should not be visited on the 1st appellant. The respondent lodged a caveat on the suit land as soon as the sale was concluded. It would have been legally impossible to effect the transfer.

Returning the certificate of title to the respondent unencumbered would mean that he would be given the title without full settlement of the loan. This would be unjust enrichment of the respondent. It would be contrary to his prayers in the plaint wherein he prayed for the return of the title after settlement of the loan.

Ground 7 succeeds

I now consider ground 8 that reads as follows:

The Learned Justices of Appeal erred in condemning the appellants into paying Shs 100,000,000/= as general damages against the weight of evidence

Regarding this ground, appellants' counsel submitted that the Justices of the Court of Appeal were wrong in believing the respondent's exaggerated evidence. He contended further that the Court of Appeal erred to award the respondent general damages amounting to Shillings one hundred million (100,000,000/=.) Counsel for the respondent did not agree.

I have already analyzed the evidence on record and with respect disagreed with the findings of the Court of Appeal with regard to the holding that the sale was unlawful. Similarly, I disagree with the decision of the award of general damages of Shillings one hundred million (100,000,000/=). The respondent was renting out his house at Shillings one million two hundred thousand (1,200,000/=) and this fact was admitted by both parties. From January 2002 to the date of the judgment, the respondent had not received any rent from his building because of legal wrangles. In fact the building was lawfully purchased by a third party on 18th January 2002. It was no longer his property.

He was not entitled to the award of any general damages.

I appreciate the submission by counsel for the appellant that awarding the respondent general damages would have effect of encouraging the borrowers to default and making mortgage law merely academic.

Ground 8, *too, succeeds.*

In the result I would allow this appeal. I would order that the respondent pays to the appellants the costs of the appeal in this court and in the two' courts below. I would also order that the 1st appellant pays to the respondent the balance of the money realized from the sale of the suit property after deducting the loan, interests and expenses.

Dated at Kampala this 21st.....day of November 2011

C.N.B. KITUMBA

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

[Coram: Tsekooko, Katureebe, Kitumba, Tumwesigye & Kisaakye JJSC]

CIVIL APPEAL NO. 22 OF 2010

BETWEEN

1. HODSING.FINANCEBANKLID } ::::::::::::::::::::::::::::::::APPELLANTS
2. SPEEDWAY AUCTIONEERS

AND

EDWARD MUSISI ::RESPONDENT

{Appeal from the Judgment of the Court of Appeal at Kampala (Engwau" Twinomujuni and Kavuma JJA) dated 26 August, 2010 in Civil Appeal No. 25 of 2004.}

JUDGMENT OF TSEKOOKO JSC.

I have read in draft the judgment of my learned sister the Hon. Lady Justice Kitumba, JSC., which she has just delivered. I agree with her conclusions. I also agree that the appeal be allowed with costs to the appellants here and in the two Courts below.

As other Members I agree the appeal is allowed in terms of the orders proposed by my learned sister, the Hon. Lady Justice Kitumba, JSC.

Delivered at Kampala this 21st day of November 2011

JWN T SEKOOKO

Justice of the Supreme Court.

THE REPUBLIC OF UGANDA IN THE

SUPREME COURT OF **UGANDA** AT KAMPALA

(CORAM: TSEKOOKO, KATUREEBE, KITUMBA, TUMWESIGYE AND KISAAKYE, JJ.S.C)

CIVIL APPEAL NO.22 OF 2010

BETWEEN

l. HOUSING FINANCE BANK LTD }.

(FORMERLY KNOWN AS HOUSING FINANCE CO (U) LTD
2. SPEEDWAY AUCTIONEERS:: APPELLANTS

AND

EDWARD MUSISI:::RESPONDENT

[Appeal from the decision of the Court of Appeal of Uganda (Engwau/ Twinomujuni and Kavuma JJ.A) dated 26th August/ 2010/ *in Court of Appeal Civil Appeal No.* 25 *of 2004].*

JUDGMENT OF KATUREEBE, JSC

I have had the benefit of reading in draft the judgment of my learned sister Kitumba, JSC, and I fully agree with her, and for reasons she has given, that the appeal be allowed. I concur in the orders she has proposed.

Dated at Kampala this 21st day of November 2011

BART M. KATUREEBE

JUSTICE OF THE SUPREME COURT

5.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

[CORAM: TSEKOOKO, KATUREEBE, KITUMBA, TUMWESIGYE, *AND* KISAAKYE JJ.SC]

CIVIL APPEAL NO.22 OF 2010

BETWEEN

1. HOUSING FINANCE BANK LTD

2

. SPEEDWAY AUCTIONEERS::: **APPELLANTS**

AND

EDWARD MUSISI :::RESPONDENT

{Appeal from the judgment of the Court 0 Appeal at Kampala (Engwau, Twinomujuni and Kavuma, JI.A) dated 26^{th} August, 2010 in Civil Appeal No. 25 of 2004}

JUDGMENT OF TUMWESIGYE, JSC

I have had the opportunity to read in draft the judgment of my learned sister, Hon. Lady Justice Kitumba, JSC. I concur in her judgment and the orders she has proposed.

Dated at Kampala this 22^{nd} day of .. November.... 2011.

JOTHAM TUMWESIGYE

JUSTICE OF THE SUPREME COURT *THE REPUBLIC OF UGANDA*

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: TSEI(OOI(O, KATUREEBE, KITUMBA, TUMWESIGYE, AND KISAAI(YE, JJ.S.C.)

CIVIL APPEAL NO. 22 OF 2010

BETWEEN

1. HOUSING FINANCE BANK LTD
(FORMERLY KNOWN AS HOUSING FINANCE CO(U) LTD}

2.SPEEDWAY AUCTIONEERS . :::::::::::::::::::::: APPELLANTS

AND

EDWARD MUSISI:::RESPONDENT

[Appeal from the decision of the Court of Appeal of Uganda (Engwau; Twinomujuni and Kavuma, JJ.A) dated 26th August, 2010 in Court of Appeal Civil Appeal No. 25 of 2004]

JUDGMENT OF DR. E. KISAAKYE, JSC

I have had the benefit of reading in draft the judgment of my learned sister, Justice Kitumba, JSC.

I concur with her that this appeal should be allowed. I also agree with the orders that she has proposed.

Dated at Kampala this 21st...........day of November...................201l.

DR. ESTHER M. KISAAKYE

JUSTICE OF THE SUPREME COURT