THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

Coram: [Owiny-Dollo, CJ, Mwondha, Tibatemwa, Tuhaise, Chibita, JJ.SC]

CIVIL APPEAL NO. 14 OF 2020

1. ANDREW BABIGUMIRA
2. WAVENETS COMMUNICATIONS LTD.....APPELLANTS

VERSUS

1. GLOBAL TRUST BANK (IN LIQUIDATION)
2. JOHN MAGEZI
3. DAVID BASHAIJA..... RESPONDENTS

(Appeal from the judgment of the Court of Appeal at Kampala (Egonda-Ntende, Musota, JJA and Kasule, Ag. JA) in Civil Appeal No. 258 of 2017 dated 20th July, 2020)

JUDGMENT OF CHIBITA, JSC

This second appeal which deals with proprietorship of mortgaged property arises from the judgment of the Court of Appeal that upheld the decision of the High Court, in High Court Civil Suit No.344 of 2013 and dismissed the appellants' appeal on the ground that it lacked merit.

Background.

The background of this appeal as gathered from the record and stated in the Court of Appeal Judgment is that the 1st appellant as a registered proprietor of the suit land comprised in Kyadondo Block 194 plot 45 at Kungu, gave a power of attorney to the 2nd appellant

to use the suit land as security for a loan facility from the 1st respondent.

The 1st respondent entered into negotiations with the 2nd appellant. The 1st respondent agreed to advance a credit facility of Ugx 100,000,000/= to the 2nd appellant and the 1st appellant surrendered the certificate of title for the said land as security for repayment of the said loan.

Both the credit facility and Mortgage deed were executed on 29th September, 2009. The loan was repayable in quarterly instalments of Ug. Shs 11,927,703/= over a period of 36 months. Having advanced the loan, on 16th October, 2009, the mortgage was registered in favour of the 1st respondent as registered mortgagee under instrument No. KLA 432467.

Upon failure to service the loan by the appellants, the loan was recalled on 15th July, 2010 by the 1st respondent which then exercised its right to foreclose as agreed under the Mortgage deed and sold the property to the 2nd respondent, in a sale agreement dated 2nd May, 2011, following a public auction conducted by the 3rd respondent. The property was sold at Ug. Shs 140,000,000/= and subsequently on 6th October, 2011, the 2nd respondent was registered as proprietor of the suit land.

The appellants filed a suit in the High Court against the respondents vide civil suit No. 344 of 2013 to cancel the 2nd respondent as proprietor of the suit property and, *inter alia*, declare that the sale was fraudulent, unlawful and illegal, the actions of the 1st respondent on the 2nd appellant's account held by the 1st respondent were unauthorized and unlawful and that the property was grossly undervalued.

It was the appellants' case that the sale of the mortgaged property was fraudulent and illegal as the 1st respondent did not follow the law in selling the subject land to the 2nd respondent because no notice of demand was ever served on the appellants as required by

law. The respondents sold off the property without notifying the appellants, and the appellants only came to know of the sale after the 2nd respondent turned up at the suit land claiming that he was the registered proprietor of the suit land having purchased the same from the 1st respondent. This in effect clogged the appellants' right of redemption, which is illegal.

The appellants also alleged that the 1st respondent undervalued the land at the time of sale and sold the mortgaged land cheaply to the 2nd respondent at 140,000,000/=. They claimed that the property which was valued at Ugx 200,000,000/= and forced sale value at 140,000,000/= in 2010 as per valuation report could not cost exactly the same price after a period of 1 year.

The appellants further stated that the 1st respondent having agreed to release a sum of Ugx 100,000,000/= and only released a sum of Ugx 98,000,000/= was in breach of the loan agreement, and the defense of retaining Ugx 2,000,000/= as processing fees would not arise as such fees are deposited prior to disbursing the loan and do not form part of the loan.

Generally, the crux of the dispute between the appellants and the respondents was the manner in which the 1st respondent played with the 2nd appellant's loan account and the realization of the property when the 1st respondent advertised and sold off the property to the 2nd respondent without notifying the appellants which in effect clogged the appellant's equitable right of redemption.

The learned trial Judge dismissed the suit claim against the respondents for lack of merit. Court found that the appellant defaulted in payment of the loan. The sale and transfer of the property to the 2nd respondent was not unlawful or illegal and that the appellants failed to prove fraud against the respondents.

The appellants being dissatisfied with the said decision appealed to the Court of Appeal but were unsuccessful hence this appeal. The appellants filed this appeal on the following grounds: -

1. **The 1st appellate court erred in law and fact when their lordships failed to properly re-evaluate the evidence on record and came to a wrong conclusion.**
2. **The 1st appellate court erred in law and fact when they held that the execution of the mortgage deed between the appellants and 1st respondent was valid.**
3. **The 1st appellate court erred in law and fact when it failed to rule on whether or not the appellants were served with a notice of default by the 1st respondent.**
4. **The 1st appellate court erred in law and fact when they denied the appellants a chance to exhaustively argue their appeal by way of filing written submissions.**

The appellants proposed to ask court for orders that: -

I. **The judgments and orders of the High Court and those of the Court of Appeal be set aside.**
II. **The appellants be granted the reliefs sought in the trial court.**
III. **The respondents pay the costs of the appeal and the courts below.**

Representation.

The appellants were represented by learned counsel Mr. Simon Kiiza Kabundama. The 1st and 3rd respondents were represented by learned counsel Mr. Bwogi Kalibbala who also held brief for learned counsel Mr. John Magezi, the 2nd respondent. The representative of the 1st respondent Mr. Erick Mugarura was also present in Court. The parties adopted their written submissions.

Submissions for the appellants.

Counsel for the appellants noted that this is a second appellate court and as such this court is not required to re-evaluate the evidence adduced at trial but would only re-evaluate the evidence if found that the 1st appellate court failed to fulfill its duty. Counsel contended that

the 1st appellate court failed to re-evaluate the evidence on record hence the need for this court to do so. He cited **Henry Kifamunte Vs. Uganda, SCCA No. 10 of 1997** and Rule 30(1) of the Judicature (Supreme Court Rules) Directions SI No. 13-11 to support this submission.

Ground one.

Counsel submitted that both lower courts failed to consider the fact that the 2nd appellant had made part payment. Counsel pointed out that the 2nd appellant made a first payment on 16th January 2010 of a sum of 11,927,703.00/=, the second on 4th April 2010 of Ugx 36,500,000/=. He added that by 4th October, 2010, the 2nd appellant had paid a sum of Ugx 39,481,770/= which reduced the loan balance to a sum of 60,518.230/= at the time the loan was recalled. Counsel contended that the learned trial Judge's finding that the 2nd appellant had not commenced payment deprived the 2nd appellant of a sum of Ugx 39,481,770/= which had already been paid.

Counsel faulted both the Court of Appeal and the High Court for ignoring the fact that the 1st respondent did not fulfill her contractual obligations as agreed in the loan agreement. He pointed out that the 1st respondent was bound to advance Ugx 100,000,000/= but instead advanced Ugx 98,000,000/=. Counsel contended that had the lower courts addressed this discrepancy, they would have ruled in the appellant's favour.

Counsel submitted further that clause 8 of the Mortgage Deed between the 2nd appellant and the 1st respondent provided for mortgagee's power to sell subject to giving prior notice to the mortgagor. Counsel argued that the 1st respondent never notified the appellant as agreed in the Deed. He contended that the evidence of service of notice of default that the respondent adduced was insufficient because the notice was not addressed to the appellant, not stamped and not on the 1st respondent's letterhead as well.

Counsel argued that DW2, Allan Raymond was not the author of the notice and could not claim to have effected service on the 2nd appellant personally. He pointed out that the notice on record was issued by Nagawa Rachael and Bamidele Osen who did not testify and as such DW2 cannot claim to have served the 2nd appellant when he did not prove how he came to serve a notice not authored by him. Counsel faulted the learned Justices of Appeal for relying on the evidence of DW2 and ignored the circumstances surrounding the purported service given the fact that DW2 did not explain the mode of service and the place where he served the 2nd appellant's Managing Director personally. Counsel further argued that since the mortgage deed provided that service shall be by post, the learned Justices of Appeal misdirected themselves by finding that lack of posting evidence did not vitiate the realization of the mortgage since there was personal service on the Managing Director.

Counsel submitted that there was no foreclosure by the 1st respondent. Counsel argued that foreclosure is the first step taken in case of default by the mortgagor. He contended that the 1st appellant has been in possession of the suit land for the last 15 years as found by learned Justice P. N. Tuhaise, JSC, in **John Magezi Vs. Andrew Babigumira SC.MA No. of 2021**. According to counsel, the 1st respondent ought to have taken possession of the suit property by way of foreclosure before selling it to the 2nd respondent. Counsel argued that the 1st respondent's actions extinguished the appellant's right of redemption. He added that the 1st appellant is still in possession of the suit land and as such the 1st respondent sold the suit land subject to the 1st appellant's rights. Counsel prayed court to find that a mortgagee cannot dispose of mortgaged property without foreclosure.

Ground two

Counsel submitted that the learned Justices of Appeal misdirected themselves by finding that the Mortgage Deed was valid. Counsel pointed out that validity of the Deed is a matter of law and although

it was not raised for determination at trial, the same can be raised on appeal. He argued that the 1st respondent signed the Deed through its Manager but not in Latin character and was not translated either, contrary to section 148 of the RTA. Counsel contended that failure to comply with the above section renders the Mortgage Deed invalid and as a result renders the sale of the property in question illegal.

Counsel cited **Fredrick Zaabwe Vs. Orient Bank Ltd & 5 Ors SCCA No. 4 of 2006** where Katureebe, CJ (as he then was) stated the rationale of section 148 of the RTA which is to ascertain whether the signatory had the authority or capacity to sign or if a witness had capacity to witness in terms of section 147 of the RTA. Counsel also cited **General Parts Ltd Vs. Non-Performing Assets Recovery Trust, SCCA No. 5 of 1999**. Counsel concluded by stating that the execution of the mortgage deed by the 1st respondent was invalid because it never complied with section 148 of the RTA. Counsel added that although this issue was not raised at trial, this court should not overlook it since it's a matter of law. In support of this argument counsel, cited **Makula International Vs. Cardinal Emmanuel Nsubuga & Anor (1982) HCB 11.**

Ground three.

Counsel relied on clause 17 of the Mortgage Deed and submitted that the Deed specified the mode of service of any notice arising. He pointed out that the purported service of the notice of default upon the appellants was not in line with the Deed and as result it was not effective service. He reiterated his earlier submissions underground one.

Ground four.

Counsel cited Article 28 of the Constitution and submitted that the right to be heard is non-derogable and thus failure by the Justices of Appeal to give the appellants' counsel an opportunity to file written submissions, denied the appellants to exhaustively prosecute the

appeal. Counsel pointed out that the appellants' new counsel was given instructions a day before the hearing date and was therefore not ready to proceed. Counsel asked court to grant the reliefs sought at the court of first instance.

Respondents' submissions:

I have perused the file and have not come across any written submissions of the 1st and 3rd respondent in reply to the appellants' submissions dated 24th August, 2021 adopted by the appellants. What is on record are the 1st and 3rd respondents' skeleton arguments dated 17th March, 2021 which echo the 2nd respondent's submissions. In the premises, I will therefore consider the 2nd respondent's submissions.

Submissions for the 2nd respondent.

Ground one.

Counsel for the 2nd respondent submitted that the Justices of Appeal carefully re-evaluated the evidence on record and came to the right decision. Counsel added that the 2nd appellant had defaulted in servicing the loan and therefore the issue of whether the credit facility was of 100,000,000/= or 98,000,000/= was not in dispute. Counsel pointed out that the 2,000,000/= that the appellant contested was a commitment fee as provided under clause 24 (i) (a) of the credit facility agreement. Counsel argued that the evidence on record points to nothing but the appellants' failure to service the loan advanced to them by the 1st respondent and was therefore in breach of the facility agreement which entitled the 1st respondent to realize the mortgage without recourse to court by public auction.

Counsel submitted further that the evidence of DW2 clearly proves that the 2nd appellant's managing director was personally served with the recall letter and acknowledged receipt thereof. He added that this evidence was corroborated by the evidence of DW3 who stated that

he advised the 1st appellant to vacate the mortgaged land for non-payment of the loan in a letter dated 4th April 2011.

Ground two.

Counsel submitted that the Mortgage Deed was signed by the manager on behalf of the 1st respondent and a stamp together with a common seal of the 1st respondent affixed to it. Counsel argued that the case of **Fredrick Zaabwe Vs. Orient Bank & 5 Ors, (supra)** which the appellant relied on is distinguishable from the instant case because in that case all three signatories did not give their names and the capacity in which they were signing and neither did the mortgagor stamp or seal the Deed. He added that the purpose of section 148 of the RTA, was met because it stated the capacity of the signatory, that is; the manager of the 1st respondent.

Ground three.

Counsel submitted that the recall letter served on the 2nd appellant served as a notice of default which was required under clause 17 of the mortgage deed even though it was not served by posting and thus the Justices of Appeal were right to hold that the appellants were duly served.

Ground four.

Counsel relied on rule 98(1) of the Court of Appeal Rules and submitted that the appellants would only file written submissions if they did not intend to appear at the hearing of the appeal. Counsel argued that the appellants had filed conferencing notes and also addressed court orally. He added further that the Court of Appeal Rules are not under any mandate to direct parties to file written submissions in support or opposition of an appeal but court directs so for expeditious disposal of an appeal. Counsel prayed court to disallow the appeal with costs.

Rejoinder.

On ground one, counsel reiterated his earlier submissions and added that the mortgage property ought to have been realized according to the mortgaged deed especially by posting the notice of default. He argued that since the Court of Appeal found that there was non-compliance with the terms of the mortgage deed, it ought to have set aside the purported realization of the mortgage property.

On ground two, counsel argued that it was conceded that the person who signed as a witness of the 1st respondent did not indicate his name and this, should be ruled in the appellants' favour.

On ground four, counsel contended the appeal was not conferenced so as to enable the parties agree on how to proceed with the appeal but court fixed it for hearing instead. Counsel argued that rule 98 of the Court of Appeal rules is inapplicable in this case because written submissions can be filed at any stage with leave of court. He reiterated his earlier prayers that the appeal is allowed with costs here and courts below.

Consideration of the appeal.

I have carefully considered the submissions of both counsel on the above grounds. The appellants' contention underground one is that the Court of Appeal failed to re-evaluate the evidence on whether or not the appellants were advanced the amount of 100,000,000/= as agreed, whether the appellants had commenced payment of the loan and whether the appellants were served with a notice of default.

At page 199 of the Record of Appeal, paragraphs 8 to 20 of the witness statement of DW2, Allan Raymond Ntagi, a banker who formerly worked with the 1st respondent, states: -

> *"That the loan was recalled by the 1st defendant on the 15th July 2010. As at the date of the recall the amount outstanding was Ug. Shs. 106,592,019/= a copy of the recall notice dated 15th July 2010 is attached marked B.*

That I personally served the 2nd plaintiff's managing director, the 1st plaintiff with the recall letter and he acknowledged receipt of the same.

That by a letter dated 6th august 2010, the 2nd plaintiff through the 1st plaintiff as managing director acknowledged the delay to its loan obligations and the call by the 1st defendant for the 2nd plaintiff to meet its loan settlement obligations. A copy of the 2nd plaintiff's letter dated 6th August 2010 is attached marked C.

That the 1st plaintiff met with the 1st defendant's officials on 6th April 2011 to discuss the recall letter and loan repayment. A copy of the 1st defendant's call report/management review meeting report is attached marked D.

That the last deposit on the 2nd plaintiff's account was on the 4th October 2010 of Ug. Shs. 36,500,000/=. The bulk of which being Ug. Shs. 26,899,127/= was used to bring the account back from an overdrawn position and the remaining balance of Ug. Shs. 9,000,000/= was withdrawn by the 1st plaintiff. A copy of the 2nd plaintiff's bank statement for the period of 4th august 2008 to 4th July 2011 is attached marked E.

That the account continued in default, attracting interest and penalties until the realization of the security by the 1st Defendant.

....

That the 1st Defendant as mortgagee in possession of the suit land sold the property to the 2nd Defendant on the 2nd May, 2011 for Ug. Shs. 140,000,000/=. A copy of the sale agreement dated 2nd May, 2011 between the 1st and 2nd Defendants is attached and marked H

That of the Ug. Shs 140,000,000/=, Ug shs. 124,000,000/= was used to offset the loan and Ug. Shs 16,000,000= was the legal and bailiff's costs for the recovery.

That the 1st Defendant realized the suit land as the 2nd plaintiff failed to meet its loan repayment obligations."

In cross examination, at page 96 of the record of appeal, DW2 stated that clause 24.1(a) provides for a commitment fee of 2% of the credit facility amount on each of the credit facility granted to the borrower.

The credit facility which is reflected at page 292 of the record of appeal as Exh P2, executed on 29th September 2009, between Global Trust Bank Ltd and M/s Wavenets Communications Ltd, provides under clause 24.1 as follows: -

"24. Fees/Commission

i. The borrower undertakes to effect payment of fees/commission/charges that will include but not limited to;

a) Commitment fee of 2% of the credit facility amount on each of the credit facility granted to the borrower.

Upon consideration of the evidence on record, the learned trial Judge at page 17 of his Judgment found as follows: -

"I have carefully considered the submissions of counsel and I agree with the defendants' counsel that there is no merit in the contention. It is true that the plaintiff was advanced Uganda shillings 98,000,000/= according to the bank statement. The plaintiff admitted that the 2nd plaintiff received this amount and it is reflected in exhibit P3 as a transaction on 16th October,2009 being loan advance. The plaintiff went ahead and utilized this amount and that is not in dispute. I do not agree that the plaintiff was not in default for failure to pay the outstanding amount. Having obtained Uganda shillings 98,000,000/= as a loan advance, the plaintiff was under obligation to pay the loan according to the terms of the agreement. Even if the first defendant withheld Uganda shillings 2,000,000/= it can be sorted out in the reconciliation of accounts. A mortgage deed was executed between the partied on 29th September, 2009 and in the

recitals it is provided that the credit facility shall be made available to the mortgagor upon executing a credit facility agreement and a mortgage deed and registration of the mortgage in favour of the mortgagee. The credit agreement was to be construed as one with the mortgage agreement. Under clause 3.1 the mortgagor undertook to pay on demand all monies advanced for the use of the mortgagor inclusive of charges incurred on account of the mortgagor or for monies whatsoever which may then be due and owing to the mortgagor and mortgagee as principal."

On appeal, the learned Justices of appeal upheld the decision of the trial court and held at page 10 and 11 of the Judgment that: -

"The testimony of PW1 confirmed that he signed the loan agreement and mortgaged the property to the 1st respondent. PW2 also confirmed that the money was advanced to the 2nd appellant on 16th October 2009 less the commitment fee of 2%. This evidence was consistent with the entry on the bank statement exhibited as P.3(a) which showed that a total of Ug. Shs. 98,000,000/= was advanced to the 2nd appellant according to the credit facility documents that had been duly signed by the appellants. The appellants cannot now turn around and claim that because Ug. Shs. 98,000,000/= was advanced by the 1st respondent, the 2nd appellant's obligation to pay had not yet commenced simply because the full Ug. Shs. 100,000,000/= was not advanced."

I agree with the findings of both the High Court and the Court of Appeal. The appellants signed a credit agreement thereby agreeing to each term stipulated thereunder. I hold that both the High Court and the Court of Appeal had properly evaluated and re-evaluated the evidence on record respectively. Both courts came to the right conclusion that the 2% less of 100,000,000/= was commitment fee as agreed under clause 24.1 of the credit facility agreement. The

appellants had the obligation to pay back the loan advanced to them as under and according to the credit facility agreement terms.

The second complaint by the appellants under this ground is that the appellant had made a deposit of Ug. Shs. 39,481,770/- yet the lower courts found that the appellants had failed to service the loan thus bring the loan balance to Ug. Shs. 106,592,019/= instead of Ug. Shs. 60,518,230/=

The evidence of the bank statement on record at page 217 of the record of appeal shows that the appellants made two deposits of Ug. Shs. 12,000,000/= and Ug. Shs. 36,500,000/= on 7/01/2010 and 04/10/2010 respectively.

In his witness statement under paragraph 8 to 13, DW2, Allan Raymond Ntagi stated that at the time the 1st respondent recalled the loan, the outstanding balance was Ug. Shs. 106,592,019/= of which upon demand, the appellant deposited Ug. Shs. 36,500,000/= on 4th October 2010 and never made any other deposit thereafter. In addition, that the bulk of the 36,500,000/= which being Ug. Shs. 26,899,127/= was used to bring the account back from an overdrawn position and the remaining balance of Ug. Shs. 9,000,000/= was withdrawn by the 1st appellant. Further that the appellants' account continued in default attracting interest and penalties until the 1st respondent sold the mortgaged property to realize the loan and interest that accrued.

It is not in dispute that the appellant had made two deposits towards repaying the loan with the 1st respondent. I note that the appellants' second installment of 36,500,000/= was made on 4th October 2010 after the 1st respondent had recalled the loan on 15th July, 2010. The bulk of the same was used to restore the account from an overdrawn position yet still the balance of 9,000,000/= was withdrawn by the 1st appellant which is not disputed. The appellants never made any other deposit thereafter.

In default of payment and with the accrued interest, the 1st respondent sold the mortgaged property in order to realize its monies and out of the 140,000,000/= from the sale of the property, 124,000,000/= off set the loan and 16,000,000/= was the legal and auctioneers costs for recovery of the monies under the credit facility which was to be borne by the appellants with interest. From the evidence, the appellants have not demonstrated how they were deprived or prejudiced of the sum of 39,481,770/= already paid owing to the fact that they were in default.

Since the appellants failed to make any other deposits to repay the loan, the lower court did not misdirect itself to find that the appellants failed to service the loan. The appellants had a debt/loan with the 1st respondent which they failed to repay. They failed to fulfill their obligation/part of the agreement which was to pay back. I do not find merit in this contention and I therefore dismiss it.

The other contention under this ground is that the appellants were not served with the notice of default by the 1st respondent in the manner as agreed under clause 17 of the Mortgage Deed. It stated as follows: -

> *"That any notice required or authorized by law or by this mortgage to be served by the mortgagee on the mortgagor or/and the donor/surety(s) or spouse of the registered proprietor(s) and shall be sufficiently served if it be sent by post in a stamped envelope addressed to the mortgagor or the guarantor/surety or spouse at its last known postal address or his last known postal address in Uganda or if it is delivered to the place of business of the mortgagor or the surety or spouse or to the last known place of residence of the mortgagor or the guarantor/surety or spouse or to the mortgaged property and that proof of posting shall be proof of service."*

DW2, Allan Raymond Ntagi, stated that he served the recall letter to the 2nd appellant's managing director personally. It is therefore true

that the 1st respondent did not notify the appellants in accordance with clause 17 of the Mortgage Deed. However, in my view, this was not fatal so as to disable the 2nd appellant from performing its own obligation. The 1st respondent endeavored to notify the 2nd appellant and the 2nd appellant acknowledged receipt of the notice. This explains the 1st appellant's letter dated 6th August 2010 to the 1st respondent to discuss the recall letter. The appellants cannot entirely contend that he was never served simply because the 1st respondent did not serve him by post. I find that this complaint in ground one had no merit and I would dismiss it.

Lastly, regarding foreclosure, Counsel contended that the 1st respondent ought to have taken possession of the property by way of foreclosure before selling it to the 2nd respondent. Counsel invited court to find that the mortgagee could not dispose of the property without foreclosure.

I will make reference to the old law (Mortgage Act, Cap 229) because the Mortgage was registered under the old law in October 2009 and the sale of the property was still governed by the old law before it was repealed on 2nd September, 2011 to the Mortgage Act, 2009.

One of the ways a mortgagee can realize his or her security under mortgage is by way of foreclosure as per section 3 of the Mortgage Act, Cap 229.

Section 8(1) further provides:

> **"Foreclosure**
>
> **A mortgagee may apply to the court to foreclose the right of the mortgagor to redeem the mortgaged land any time after the breach of covenant to pay."**

Section 9 provides the mode of sale by foreclosure which is by a public auction.

Section 10(1) provides:

"Sale otherwise than by foreclosure

Where the mortgage gives power expressly to the mortgagee to sell without applying to court, the sale shall be by public auction unless the mortgagor and encumbrancers subsequent to the mortgagee, if any, consent to a sale by private treaty."

Having found that the appellants failed to pay the loan and were duly notified of the default but still failed to pay, both the Mortgage deed under clause 8 and the credit facility agreement under clause 25 expressly permitted the 1st respondent to sell by public auction without recourse to court in order to realize the mortgage property upon default of payment. This was in line with section 10 of the Mortgage Act Cap 229.

The mortgage having been duly registered in favour of the 1st respondent as registered mortgagee in possession of the property and not necessarily physical possession on 16.10.09 vide Instrument No. KLA 432467 gave the mortgagee the power of sale. The mortgagee therefore exercised the option of sale by public auction after default payment in order to recover its monies hence the sale of the property to the 2nd respondent which, as rightly found by the lower courts, was not unlawful or fraudulent.

In the circumstances this ground fails generally for the reasons given above.

Ground two

The appellants contend that the Mortgage Deed was invalid because the 1st respondent's manager never signed in Latin character as stipulated under section 148 of the Registration of Titles Act.

While dealing with the above issue, Musota, JA in his lead Judgment at page 7 to 10 which the other Justices on the Coram stated as follows: -

"I have carefully looked at the copy of the mortgage deed which was produced in court and appears at page 301 of the record. The execution page shows for signatures and on behalf of the mortgagee, global trust bank, was a signature of the bank manager but with no name affixed to it. section 147(1) (a) (V) of the RTA authorizes a bank manager to attest instruments.

The Supreme Court in the case of Fredrick Zaabwe Vs. Orient Bank & Ors SCCA No. 4 of 2006 Katureebe, JSC (as he then was) addressed this issue extensively. He stated.

"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?

...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 RTA.

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

From the above excerpt, it is my considered view that the purpose of section 148 of the RTA is to make it clear to the viewer of the document that the person who signed the document had capacity to do so.

In General Parts (u) Limited Vs. Npart, Civil Appeal No. 5 of 1999 it was held that;

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

The mortgage document was produced in evidence as Exh. P9. On the face of it, it is a mortgage wherein Haruna Semakula and the appellant, both recited therein, as registered proprietors of the lands listed, mortgaged the lands to UCB. However, the appellant did not affix its common seal to the document, nor did any one, appointed as its attorney, sign the document, on its behalf. What appears at the foot of the document, in the space provided for execution by the mortgagor, are two scribbled signatures, with

the word 'director' written under one of them, and the word 'secretary' written under the other. The names of the signatories are not added. Even if it be assumed from the evidence of Haruna Semakula, that one of the signatures is his, and that the second one is of another official of the appellant, there is no evidence to show that they, or either of them, signed as the Registration of Titles Act. The mortgage, therefore, is defective in two respects. The signatories did not only fail to comply with the requirements of section 156 of the RTA, but also, they did not sign by virtue of any registered power of attorney pursuant to section 154(1) of the Act."

The Supreme Court decision in General Parts (U) Ltd (supra) states that for one to duly execute a mortgage document, it had to either affix its common seal to the document or to act by its attorney by signing the document in the manner prescribed in section 148. In the current case, the mortgage deed was signed on behalf of the mortgagee by the manager with a stamp and the company seal for Global Trust Bank (U) Ltd. The name of the manager was not included as required by section 148 of the RTA however the seal and stamp were affixed together with the capacity in which the signature was made and in my view, this served the purpose laid out in Fredrick Zaabwe (supra). In that regard, the appellants' issue of whether the mortgage deed was validly executed is answered in favour of the respondents."

Clearly, the above findings of the Court of Appeal extensively discussed the application of section of 148 of the Registration of Titles Act in two different cases of this Court; that is **Fredrick Zaabwe (supra)** and **General Parts Ltd** (supra). As stated in the above findings, the mortgagee was represented by its manager who signed in that capacity and accompanied it with the stamp and seal of the 1st respondent's company. In my view, the learned Justices of Appeal rightly found that the Mortgage Deed was validly executed. I therefore agree with their findings and dismiss this ground of appeal.

Ground three.

The contention under this ground has been resolved under ground one. I find and hold that the appellants were duly served with the notice of default by way of the recall letter dated 15th July 2010.

Ground four.

The appellants' complaint under this ground is that they were denied the right to be heard when the learned Justices of Appeal denied them opportunity to file written submissions.

I would like to state that directions to file written submissions is at court's discretion. The court can either direct counsel to file written submissions for speedy disposal of an appeal or direct to handle an appeal by way of oral submissions. In the instant case, the court chose to handle the appellants appeal by way of oral submissions.

The appellants' counsel was present and he proceeded with the appeal orally. The Court of Appeal in this matter was the 1st appellate court. As the 1st appellate court, it had a duty to review the evidence on record and come up with its own findings. In my view, even though there are no written submissions on record, court can determine an appeal basing on the evidence on record. I do not agree with counsel for the appellants that the appellants were denied a fair hearing because they were not allowed to file written submissions. I find no merit in this ground and I hereby dismiss it.

In the result, I find that this appeal fails on all grounds and I would dismiss it with costs to the respondents. I would uphold the Judgment of the Court of Appeal and so order.

Dated at Kampala this 24th day of October 2023.

Mike Chibita

JUSTICE OF THE SUPREME COURT.

Delivered as directed today

Babirye

24/10/2023.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: OWINY-DOLLO, CJ; MWONDHA; TIBATEMWA-EKIRIKUBINZA; TUHAISE; CHIBITA; JJ.S.C.]

CIVIL APPEAL No. 14 OF 2020

BETWEEN

1.ANDREW BABIGUMIRA
2.WAVENETS COMMUNICATIONS LTD :::::::::::::::::::::::::::::: APPELLANTS

AND

1. GLOBAL TRUST BANK (In Liquidation)
2. JOHN MAGEZI
3.DAVID BASHAIJA :: RESPONDENTS

[Appeal arising from the judgment of the Court of Appeal at Kampala dated 20th July 2020 before (Kasule,Ag.JA; Egonda-Ntende and Musota, JJA) in Civil Appeal No. 258 of 2017.]

JUDGMENT OF PROF. TIBATEMWA-EKIRIKUBINZA, JSC.

I have had the benefit of reading the judgment of my learned brother, Hon. Justice Mike Chibita, JSC. I agree with his analysis and conclusion as well as the orders he has proposed.

Dated at Kampala this 24th day of October 2023.

.....

HON. JUSTICE PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

CORAM: OWINY-DOLLO CJ; MWONDHA, TIBATEMWA-EKIRIKUBINZA, TUHAISE AND CHIBITA JJSC

CIVIL APPEAL NO. 14 OF 2020

1. **ANDREW BABIGUMIRA**
2. **WAVENETS COMMUNICATIONS LTD ..... APPELLANTS**

VERSUS

1. **GLOBAL TRUST BANK (IN LIQUIDATION)**
2. **JOHN MAGEZI**
3. **DAVID BASHAIJA.....RESPONDENTS**

(Arising from the Court of Appeal No. 258 of 2017 Judgment at Kampala, before Egonda-Ntende, Musota, JJA and Kasule Ag. JJA dated 20th July, 2020)

JUDGMENT OF OWINY - DOLLO; CJ

I have had the benefit of reading in draft the judgment of my learned brother Chibita, JSC, and I concur with the reasoning, conclusion and orders proposed therein.

Since Mwondha, Tibatemwa-Ekirikubinza and Tuhaise; JJSC also agree, orders are hereby issued as proposed by Chibita JSC in his judgment.

Dated, and signed at Kampala this 24th day of October 2023

Alfonse C. Owiny - Dollo

Chief Justice

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: OWINY -DOLLO, C.J; MWONDHA; TIBATEMWA; TUHAISE; AND CHIBITA JSC)

CIVIL APPEAL NO14 OF 2020

(1) Andrew Babigumira
(2) Wavenets Communications Ltd ..... Appellants

Versus

(1) Global Trust Bank (in liquidation)
(2) John Magezi ..... Respondents
(3) David Bashaija

(Appeal rising from the judgment of the Court of Appeal Civil Appeal No. 258 of 2017 at Kampala before (Egonda Ntende, Musota, JJA and Kasule Ag. JA, dated 20th July, 2020)

JUDGMENT OF MWONDHA JSC

I have had the benefit of reading in draft the judgment of my learned brother Chibita JSC.

I concur with the reasoning, decision and proposed orders made.

Dated at Kampala this ..... 24th day of October 2023

Mwondha
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: OWINY-DOLLO, CJ; MWONDHA; TIBATEMWA-EKIRIKUBINZA; TUHAISE; CHIBITA; JJSC)

CIVIL APPEAL NO. 14 OF 2020

1.ANDREW BABIGUMIRA

2.WAVENETS COMMUNICATIONS LTD.....APPELLANTS

VERSUS

1.GLOBAL TRUST BANK (In Liquidation)

2. JOHN MAGEZI

3.DAVID BASHAIJA.....RESPONDENTS

[Appeal from the Judgment of the Court of Appeal at Kampala before Egonda-Ntende, Musota, JJ.A and Kasule, Ag. JA, in Civil Appeal No. 258 of 2017 delivered on 20th July, 2020]

JUDGMENT OF PERCY NIGHT TUHAISE, JSC.

I have had the benefit of reading the Judgment of Hon. Justice Mike Chibita, JSC.

I agree with the decision, and the orders therein.

Date at Kampala, this ..... day of.....2023.

Percy Night Tuhaise

JUSTICE OF THE SUPREME COURT