

UGANDA / JUDGMENT

AK detergents Ltd v M Combined Ltd (Civil Appeal 17 of 1998) [1998]

UGCA 51 (15 September 1998)

[1998] UGCA 51

COURT

Court of Appeal of Uganda

BEFORE

Manyindo, DCJ, Okello, JA, Twinomujuni, JA

CASE / FILE NUMBER

Civil Appeal 17 of 1998

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THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**CORAM: MANYINDO, D. C. J., OKELLO, J. A. AND TWINOMUJUNI, J. A.****CIVIL APPEAL NO. 17 OF 1998****BETWEEN**

| 1. | A. K. DETERGENTS LTD | } |

|---|-----|-----|

| 2. | DEVELOPMENT FINANCE COMPANY OF UGANDA LIMITED | } |

| 3. | FULGENZIO MUNGHEREZA | } APPELLANTS |

| 4. | ERIEZA KAGGWA | } |

| 5. | UGANDA DEVELOPMENT BANK | } |

VERSUS**G. M. COMBINED (U) LIMITED {RESPONDENT**

(Appeal from the Judgement of the High Court at Kampala before the Hon. Lady Justice C. K. BYAMUGISHA dated 22nd April, 1998 in H. C. C. S. No.348 of 1994)

JUDGEMENT OF MANYINDO, D. C. J.

the other four appellants. This is an appeal against the judgment of the High Court (Byamugisha, J), delivered on 22nd April, 1998 in High Court Civil Suit No. 348 of 1994. In that suit the respondent company originally sued the first appellant alone, for recovery of land which was allegedly unlawfully and fraudulently transferred by the first appellant from the respondent's names into the names of the first appellant. The plaint was amended when, by order of the trial Judge and at the instance of the second, third, fourth and fifth appellants, those parties were added to the suit as co-defendants. The plaint was amended only to reflect them as parties; respondents' claim remained against the first appellant only as it had no claim against the

The facts of the case can be stated briefly as follows. The respondent, a limited liability company incorporated in Uganda, was the registered proprietor of the suit lands, namely, (1) leasehold Register 1618 Folio 14, (2) leasehold Register 1362 Folio 21, (3) leasehold Register 1616 Folio 10, (4) leasehold Register 1491 Folio 8, (5) leasehold Register 1683 Folio 15, (6) leasehold Register 1619 Folio 5, and (7) leasehold Register 1261 Folio 21. All the above properties are situated at Mbuya in Kampala. They are comprised in seven certificates of title which were tendered in evidence at the trial.

The respondent operated a soap factory on the land comprised in leasehold Register 1362 Folio 21. That factory was set up with funds borrowed by the respondent from the second and fifth appellants. The loans were secured by debentures and mortgages duly executed by the respondent in favour of the second and fifth appellants. The debentures (two in favour of the fifth appellant and one in favour of the second appellant.) were registered at the registry of Companies but not at the Registry of Lands. The three debentures and their certificates were put in evidence. The debentures provided inter alia, for appointment of Receivers/Managers to realise the second and fifth appellants' assets in the event of default on the loans by the respondent.

The respondent defaulted on the loans, whereupon the second and fifth appellants jointly appointed the third and fourth appellants to be joint Receivers and Managers of the respondent. The appointment was made in writing, as required under the debentures. Within three months of their appointment the third and fourth appellants sold the suit land to the first appellant under an Agreement of Sale dated 21st March, 1994. The first appellant was subsequently registered as proprietor of all the suit land on the strength of transfer instruments or Deeds duly executed by the third and fourth appellants in their capacity as Receivers/Managers of the respondent.

The respondent challenged the transfers and sought an order of the High Court cancelling the first appellant's certificates of title. They also sought general damages for trespass and conversion and an injunction restraining the first appellant from trespassing on the suit land, converting and passing off as owners of the same. In their plaint the respondent's claim against the first appellant was, in summary, that the latter had fraudulently and without a claim of right acquired the respondent's suit lands. The particulars of the alleged fraud were set out in paragraph 7 of the plaint as follows:

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- n a) The first defendant knew the plaintiff was the owner of the lands,
- b) The first defendant was party to fraud by lodging transfer instruments, while it knew that the alleged transferor had no lawful title in the plaintiff's property to pass to the defendant,
- c) The first defendant knew of the defect in title having been put on notice in the local newspaper advert (attached hereto) and a letter to the director in the plaintiff company Mr. Alli Karmali (copies attached marked "A" and "B" respective),
- d) The first defendant was party to the fraud having paid no consideration paid for the said lands or any of the Company's properties, (sic).
- e) The first purchaser was not a bidder of the suit property which *q* the condition of the sale thereof at all, (sic)
- f) The first defendant made the plaintiff's caveat disappear from the land registry to make it appear that the land was not encumbered,
- g) The first defendant was party to the fraud by paying a gross under value for the said land or any of the company's properties,
- h) The defendant was party to the fraud when it allegedly paid for the property not defined in the sale agreement allegedly executed by the defendant,
- i) The defendant was party to the fraud by not indicating the exact consideration paid for each of the property of the company it is alleged to have bought."

Paragraphs 8 & 9 of the amended plaint contained alternative claims which are to the effect that the purported sale and transfer of the suit lands to the first appellant by the Receivers/Managers was illegal and therefore of no consequence.

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The first appellant's defence was, in the main, that it had purchased the suit land from the Receivers/Managers for value and in good faith and that they had acquired clean titles. They denied that they were guilty of fraud or trespass. The second, and fourth appellants put in a joint statement of defence.

The fifth appellant filed a separate defence. However, the cumulative effect of the defence of these four appellants is that the second and fifth appellants had lawfully appointed the third and fourth appellants Receivers/Managers of the respondent under the debentures following default on the loans by the respondent. The respondent's suit lands had been lawfully sold by the third and fourth appellants in exercise of the powers granted to them by the debentures. They had then

properly transferred the suit lands to the first appellant who had paid the full purchase price. The third and fourth appellants contended that they had title to the respondent's property as Receivers/Managers of the respondent under the debentures which were duly executed by the respondent but whose terms the respondent had breached. They also contended that the suit property was not encumbered, that it had been sold at the best market value obtaining at the time and that the first appellant's bid was the best amongst all bids received by the third and fourth appellants.

At the trial only one issue was framed by court for determination. It was whether the transfer of the suit lands to the first appellant for the respondent was effectual. But in her considered judgment the trial Judge took the position that although fraud was not specifically framed as an issue, it was obvious from "the way the parties conducted themselves" that fraud was left to the court to determine.

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as The respondent called one witness, Edward Karibwende, a Registrar of Titles. His evidence was to the effect that the transfers to the first appellant were made not by the respondent but by the third and fourth appellants Receivers/Managers of the respondent; that the third and fourth Appellants were not named on the suit lands' certificates of title as proprietors thereof; that the debentures under which the third and fourth appellants were appointed Receivers/Managers of the respondent were not registered at the land registry.; that the Registrar who effected the transfers of the suit lands to the first appellant must have perused those transfers and accompanying documents and got satisfied that they were in order; that in land transactions it is the registered proprietor or his duly appointed attorney who is entitled to transfer land; that an attorney is one appointed by the registered proprietor under a power of attorney; that the third and fourth appellants did not transfer the respondent' lands to the first appellant as attorneys of the respondent but as Receivers/Managers of the respondent; that the debentures were not registered on the land Register as mortgages when they should and that there was no caveat lodged by anyone on the suit lands.

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The first and fifth appellants did not lead evidence. Counsel for the second, third and fourth appellants called one witness, Patrick Ogule, the legal Manager of the second appellant. The gist of his evidence was that when the respondent defaulted on the loans the second and fifth appellants appointed the third and fourth appellants as joint Receivers/Managers of the respondent. The appointment was done in writing and was communicated to the Registrar of Companies in writing. The appointment was done under the debentures which had been registered with the Registrar of companies as a charge. The Receivers/Managers sold the suit lands to the first appellant in accordance with the provisions of the debentures.

According to this witness, the debentures did not refer to specific properties of the respondent but referred to all of the respondent's immovable properties. In his view the debentures created a fixed charge over all the immovable assets of the

respondent and in particular, the freehold and leasehold properties of the respondent.

After the parties closed their case in the High Court, Counsel for the respondent and first appellant made oral submissions. Counsel for the second, third, fourth and fifth Appellants filed written submissions. I will allude to those submissions later in the judgment as they were repeated in large measure in the appeal.

The learned trial judge made the following findings in her judgment.

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First, that the appointment of the third and fourth appellants as Receivers/Managers was made not only in accordance with the debentures but also in accordance with section 103 (1) of the Companies Act. Second, that under the debentures the Receivers/Managers were given broad terms with regard to the recovery of the loans. Third, that the Receivers/Managers were agents of the respondent and as such they had power to sign the transfer instruments. Fourth, that there was a floating charge which was crystallised by the appointment of the Receivers/Managers. Fifth, that in case of the floating charge it had to be supported by an equitable mortgage evidenced by the lodgement of a caveat under section 138 of the Registration of Titles Act because the mortgagor retains the right of redemption of the mortgaged property. Sixth, that in the instant case at the time the Receivers/Managers were appointed no instruments had been registered at the land office in respect of the suit lands although the suit lands had been brought under the operation of the Registration of Titles Act. Seventh, that non registration of the instruments including the debentures, under the Registration of Titles Act, meant that the legal interest or estate remained in the respondent as the registered proprietor and that the Receiver/Manager could only sell the respondent's suit lands if the respondent authorised them to do so by power of attorney under section 154 (i) of the Registration of Titles Act. The Receivers/Managers could not sell the property under the debentures alone since "debentures were not a law unto themselves".

Eight, that the respondent had proved fraud because (a) the Receivers/Managers had sold the suit lands to the first appellant barely three months after their appointment, (b) the consideration was not stated on the transfer instruments when it should, (c) there was no caveat lodged to support the equitable mortgage as required by section 138 of the Registration of Titles Act, and (d) that each appellant, but particularly the first appellant, should have testified in defence of the registration of the suit land into the names of the first appellant.

The learned Judge stated that:

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"How the first defendant's name arrived on the register is shrouded in mystery and of course these are matters within its knowledge and it was bound to prove them under section 105 of the Evidence Act"

As for the remaining appellants she put the matter thus:

"If in the process of enforcing the debentures the receivers commit fraud, the plaintiff as the principal is entitled to sue them. They were accountable to it. The plaintiff's plaint was not amended to show that the receivers and debenture holders committed fraud. It did so by implication when it questioned how the first defendant's name got on the register. Therefore an explanation was needed to show that the receivers and debenture holders had the right to sell the plaintiffs registered lands without any power of attorney executed for them for that purpose and in view of the fact that debentures were not registered under the RTA."

She therefore came to the conclusion that the debenture holders could only realise their security by obtaining an order of court to sell the suit lands as they had not registered the debentures at the land office in order to create a legal mortgage to enable them to convey the legal estate to a subsequent purchaser. Therefore the first appellant could not claim to have dealt with a registered proprietor and so it had no legal protection. The learned judge wrapped up the matter as follows:

"In conclusion, I think there is sufficient evidence on record on which the court can safely make a finding that the defendants colluded with each other not only to deprive the plaintiff of its registered legal estate in the suit property but also its equitable remedy of redemption. The purported sale without an order of court

seems to have been intended to do just that. Consequently the transfer instruments executed by the receivers were of no legal consequence."

She then allowed the respondent's suit with costs. She granted the injunction order and also directed the Registry of Titles to cancel the first appellant's registration and reinstate the respondent as proprietor of the suit lands. Hence this appeal.

The first appellant's memorandum of appeal contains foregrounds of appeal which are:

The learned trial judge erred in fact and in law when she held that evidence to prove fraud had been adduced by the Plaintiff whereas not. 1.

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- 2. The learned trial judge erred in law in shifting the burden of proof from the Plaintiff to the first Defendant by holding in absence of evidence of fraud that the first Defendant was duty bound to defend its registration as proprietor of the suit properties and show how it got its name on the register.
- 3. The learned trial judge erred in law when she held that:

- (a) Debentures not registered at the Lands Registry create only equitable charges not enforceable without a Court Order,
- (b) The Transfer instruments executed by the receivers were of no legal consequence, and thereby ignored or failed to apply an authority of the Supreme Court cited to and binding upon her to wit conclusion, I think there is sufficient evidence on record on which the court can safely make a finding that the defendants colluded with each other not only to deprive the plaintiff of its registered legal estate in the suit property but also its equitable remedy of redemption. The purported sale without an order of court seems to have been intended to do just that. Consequently the transfer instruments, **S. C. C. A. NO. 29 OF 1995 GRINDLEYS BANK) UGANDA) LIMITED v. UGANDA BOTTLERS LIMITED and S. C. C. A NO. 16 OF 1996 KAMPALA BOTTLERS LIMITED** which held to the contrary.
- 4. The learned trial judge misdirected herself and erred in failing to find that the plaintiff had failed to prove its case to the standard required".

In their joint memorandum of appeal the second, third and fourth appellants raised the following fifteen grounds:

- 1. The learned Trial Judge misdirected herself and erred in law by finding fraud by implication when no evidence was led by the Respondent to prove fraud.
- 2. The learned Judge completely misdirected herself in arriving at the conclusion that there was fraud simply because the suit property was transferred to the First Appellant within 3 months after the appointment of Receivers.
- 3. The Learned Trial Judge completely misdirected herself and erred in law in holding that despite the fact that fraud was not specifically framed as an issue, it was left to the Court to determine.
- 4. Having rightly found that a Purchaser is not required to inquire how the proprietor or mortgagee got registered and that the Title of the purchaser can only be impeached on proof of fraud, and that in law Receivers and Managers are agents of the debtor company, the Learned Trial Judge contradicted herself and came to the wrong conclusion that the First Appellant was registered fraudulently.
- 5. The Learned Trial Judge completely misdirected herself when she held that the Appellants colluded with each other to deprive the Respondent of its registered legal estate and its equitable right of redemption when no evidence to that effect was adduced.
- 6. The Learned Trial Judge misdirected herself in concluding that there was no consideration stated on the instruments of transfer when the Transfer Instruments Exhibit DI mentioned that the consideration was to be found in the attached Agreement of Sale - which was deliberately not Exhibited by the Respondent.

- 7. The Learned Trial Judge further erred in law in concluding that it was incumbent upon the First Appellant to prove how it got on the register under Section 105 of the evidence Act, in the process ignoring the Provisions of Section 100 of the same Act.
- 8. The learned Trial Judge erred in law in holding that the debenture holders (Appellants No. 2 and 5) had to register the debentures under Section 115 of the R. T. A.
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- 9. The Learned Trial Judge erred in law in holding that the fact that the debentures were not registered at the Land Registry constituted the Fourth and Fifth Appellants as equitable mortgagees.
- 10. The learned Trial Judge erred in law in holding that the Respondent had to execute separate powers of attorney in favour of the debenture holders Appellant No. 2 and No.5.
- 11. The learned Trial Judge misdirected herself in delving into the issue of the remedy of redemption which was not raised at the trial and about which no evidence was adduced by either party.
- 12. The Learned Trial Judge erred in law in holding that the Second and Fifth Appellants had to apply to Court for foreclosure.
- 13. The Learned Trial Judge erred in law in holding that the Transfer Instruments executed by the Receivers were of no legal consequence.
- 14. The Learned Trial Judge misdirected herself in granting a permanent injunction against the First Appellant.
- 15. The Learned Trial Judge erred in law and misdirected herself in failing to follow binding decisions of the Court and thereby arrived at the wrong action".

The fifth appellant appeals on six equal grounds, namely:

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- 1. The Learned Trial Judge erred when she shifted the Burden of Proof whereby the Respondent was not called upon to prove its case, but the Appellant was required to disprove the allegations made by the Respondent.
- 2. The Learned Trial Judge erred when she held that the Fifth Appellant as debenture holder committed fraud whereby the suit property was transferred from the Respondent to the First Appellant.
- 3. The Learned Trial Judge, erred when she held that a finding of fraud against the Fifth Appellant could be sustained when:

- (i) fraud was never alleged by the Respondent's pleadings against fifth Appellant; and
- (ii) no particulars of fraud were disclosed by the Respondent as against the Fifth appellant; and
- (iii) Fraud was never framed as an issue and
- (iv) no evidence of fraud was adduced;

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- (v) no evidence of collusion by the Appellants was adduced.
- 4. The Learned Trial Judge misdirected herself over the legal status of Receivership when she made a finding that a Debenture properly created and registered under the Companies Act, which has crystallised by the appointment of Receivers creates an equitable rather than a legal interest in the charged property.
- 5. The Learned Trial Judge erred when she held that the Third and fourth Appellants as Receivers properly appointed by the Fifth Appellant as Debenture holder, and who in law and under the Debenture Deeds are agents of the Respondent, could not lawfully transfer the suit property by virtue of a charge which had crystallised; but that lawful transfer thereof required (the Receivers) to have had either a Power of Attorney granted by the Respondent or any order of a court (sic).
- 6. The Learned Trial Judge in her holding improperly applied the doctrine of the equity of redemption thereby making an inference that the Fifth Appellant denied the Respondent an opportunity to redeem the charged property when:
 - (i) denial of an opportunity to redeem the charged property was not an issue;
 - (ii) no evidence was adduced to prove that the Respondent was deprived of the equity of redemption, (sic)."

Learned Counsel for the respondent supported the trial judge's decision on another ground under a notice of grounds for affirming the decision which was lodged in Court Under Rule 91 of the Rules of this Court. The ground reads thus:

"The 2nd and 5th appellants as debenture holders of the debentures tendered in evidence in the suit were not legal nor equitable mortgages of the suit property. Since the debentures did not create any interest or charge in the registered lands of the Respondent and their appointees the 3rd and 4th appellants had no legal estate or interest in the suit property to convey to the first appellant".

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I think the ground is superfluous since the learned trial judge had made a holding to that effect. In this appeal all the Counsel for the appellants filed written arguments under Rule 97 of the Rules of this Court. Counsel for the respondent responded in writing in respect of the first and fifth appellants but made oral submission in respect of the second, third and fourth appellants.

At the hearing of the appeal we found it necessary to take additional evidence of Edward Karibwende who had testified for the respondent at the trial and who had tendered in evidence the instruments of transfers (exh P2). On the transfer instrument is space where the consideration for the transaction should have been indicated. However in that space there is an entry which reads "see attached Agreement of Sale". The agreement of sale was not produced in evidence by Mr. Karibwende and yet the matter of consideration became a bone of contention in the case. Counsel for the respondent objected to the evidence being taken as it could prejudice his client's case. He argued that in an adversarial system like ours, courts should not assist parties by way of evidence but should leave it to the parties to fight it out. We overruled the objection for reasons which we reserved. ^I now give my reasons. We were satisfied that the interest of justice demanded that the transfer and the sale agreement be read together in order to decide the matter one way or the other. We were fully aware of the good old principle that the court of appeal should take additional evidence only in exceptional cases. We were convinced that this was such a case as the evidence was relevant and vital for the proper determination of the issue at hand. It is clear that even counsel for the respondent was fully aware of the importance of this evidence hence their submissions (page 7) that:

"Yet still no evidence of any consideration paid was adduced whether at the trial court or appellate court. if the appellant desires to claim protection as a bonafide purchaser, he ought to have sought for additional evidence even on appeal." (sic).

It was for this reason that we overruled the objection and admitted the agreement of sale in evidence.

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The thrust of the first appellant's appeal is that the alleged fraud against it had not been proved; that the court wrongly held, in absence of fraud, that the first appellant had a duty to show that it had been properly registered as owner of the suit property; that it is not correct in law that debentures not registered at the land office create only equitable charges not enforceable without a court order and that the trial court should have held that the transfer instruments were valid and of legal consequence.

The salient points of the appeal of the second, third, fourth and fifth appellants as can be discerned from their respective memoranda and submissions can be stated as follows: (a) that fraud must be established by evidence which was not done here; it cannot be implied, (b) that the issue of fraud which was not specifically framed, was not left to the court for determination, (c) that the trial Judge wrongly held that the Receivers/Managers had made a fraudulent transfer to the first appellant when she had found that the Receivers/Managers were agents of the respondent,

(d) that the finding that the appellants were guilty of collusion was not supported by evidence, (e) that in law the debenture holders did not have to register the debentures under the Registration of Titles Act, (f) that it was wrong to hold that non-registration of the debentures at the land Registry constituted the second and fifth appellants as equitable mortgagees only, (g) that in law there was no need for execution of separate powers of attorney and a court order of foreclosure to be obtained before the sale, (h) that the matter of redemption did not fall for decision^!) that the permanent injunction was unwarranted as the trial judge could have ordered rectification of the sale and transfer, if it was not in order. For the * respondent it was argued by its counsel that all the acts of fraud alleged against the first appellant in paragraph 7 of the plaint had been proved by Mr. Karibwende's evidence

which showed (a) that the Receivers/Managers had only within 3 months of their appointment effected the sale and transfer to the first appellant when they did not possess the written power of attorney from the respondent as registered proprietor of the property, (b) that there were no debentures registered on the land register and there was no caveat lodged and (c) there was no known consideration for the sale and transfer.

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Receivers/Mangers. It was submitted that the trial judge rightly found that the Receivers, although agents of the respondent, were not its attorneys, in the context of the Registration of Titles Act, who could transfer the suit lands to the first appellant. The debentures did not confer powers of attorney on the Receivers/Managers. On the alternative claim that the transaction was illegal, it was submitted that as the first appellant was registered outside the Registration of Titles Act, the whole transaction was illegal and therefore not protected by that Act. The first appellant was bound to prove that the registration was legal but did not. It was contended that the debentures created no interest in the suit lands and thus conferred no estate or interest on the

Finally it was submitted that the debentures were of no consequence as they had not been registered at the land office and that the transfer instrument was of no effect as it was signed not by the registered proprietor (respondent) but by strangers to the register - the Receivers/Mangers .

With regard to the second and fifth appellants, it was submitted that although fraud was not pleaded against them, that fact would not affect the trial judge's finding of collusion on their part since they had:

" originated and orchestrated the illegal and fraudulent take over, sale of the suit lands and transfer thereof to the first appellant and acted in concert with all the appellants in this illegal and fraudulent transaction."

The second argument seems to be that the second and fifth appellants wrongly invoked the debentures, through the appointment of Receivers/Managers who

carried out the sale and transfer, as the security created by the debentures did not include the suit lands.

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Regarding the third and fourth appellants, the respondent's answer to their appeal is as follows. They had no power to deal with the suit lands as they were not the attorney's of the respondent which was the registered proprietor of same. They were only agents and not the principal. They had not established at the trial that the debentures under which they proceeded created a security for the loan. There was no evidence as to how much money was lent by the debenture holders to the respondent or how much was owing. There was no evidence of default and no evidence of sale of the suit lands. The debentures which formed the basis of the registered at the land Registry, the Agreement of sale does not refer to the suit lands and even the letter appointing/the Receivers/Managers does not specify the assets to be sold by them. It follows, it was submitted, that instruments executed by the third and fourth appellants were ineffectual. transaction were defective in that they did not specify the property mortgaged. Although the trial judge did not add collusion as an issue, she rightly found that the third and fourth appellants were guilty of collusion because they sold the suit lands when they had no title to it. The debentures did not empower the Receivers/Managers to sell the immovable assets of the respondent. Receivers/Managers can only deal with properties charged by the debentures. In the instant case the suit lands were not mentioned in the debentures -attd were not

I think it is not disputed (a) that the suit lands belonged to the respondent before they were transferred to the first appellant, (b) that the respondent borrowed money from the second and fifth appellants although the respondent's plaint is silent on this point ,(c) that the respondent executed the debentures in question in favour of the second and fifth appellants as security for the loans, (d) that under the debentures the second and fifth appellants had the power to appoint Receivers/Managers in the event of default on the loans by the respondent, (e) that

under the debentures once Receivers/Managers were appointed they would become the agents ofthe respondent and would be entitled to exercise the powers set out in the debentures which included the power to sell the respondent's charged properties.

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Under clause 2 of the two debentures executed in favour of the second appellant, the charged properties were "the land and all the undertaking, property and assets whatsoever ofthe borrower, both present and future."

The debentures further provided that as regards all the immovable property charged, the security would constitute a fixed charge while it would be a floating charge over the remainder ofthe undertaking.

Under clause 5 (1) (a) and (b) of the debenture executed by the respondent in favour of the fifth appellant the charged properties were the freehold and leasehold property, fixed plant and machinery and there was a floating charge over all assets of the respondent. It seems very clear to me from the above provisions of the debentures that all the immovable assets of the respondent, including the suit lands, were charged under the debentures. It is immaterial that the suit lands were not specifically mentioned in the debentures. I therefore find the contention by Counsel for the respondent that the suit lands were not charged Hitenable.

The evidence of Patrick Ogule (DW1) that the second and fifth appellants appointed the third and fourth appellants Receivers/Managers of the respondent following the latter's default on the loans was not challenged in cross-examination or at all. It is quite remarkable that the respondent did not allude to the loans or the default in its pleadings or at all. ^I think it is clear from the debentures and certificates of registration of the mortgages at the Companies Registry which certificates were put in evidence, that the respondent borrowed huge sums of money from the second and fifth appellants. It is also

clear from the evidence of Ogule and the pleadings of the second, third, fourth and fifth appellants which were not challenged, that the respondent defaulted on the loans, where upon its suit property was put on sale. Mr. Karibwende testified that he had in his possession the bid documents which were presented to this office together with the transfer forms and sale Agreement.

The next question is whether the third and fourth appellants, as Receivers/Managers, could sell the charged properties when the debentures had not been registered under the Registration of Titles Act. With respect to the learned trial judge I cannot agree that debentures not registered with the Registrar of Titles create only equitable charges not enforceable without a court order. The basis of her decision was that the debentures must be brought under the Registration of Titles Act since under that Act only the registered proprietor or a donee of powers of attorney may sell and transfer property. This can be seen from her statement that:

"appointment of a receiver did not change the legal character of the parties except if the plaintiff had executed a power of attorney in favour of the debenture holders under the provisions of section 154 of the R. T. A."

But the learned judge seems to have overlooked the clear provision in clause 7 of the debentures which stated:

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"After the security shall have become enforceable the Borrower shall do all such acts and things and shall execute all such assurances and instruments, as the Debenture Holder or the Receiver in the exercise of the powers, or any of them, conferred by this debenture shall reasonably require and the borrower hereby irrevocably appoints the Debenture- Holder and any receiver appointed hereunder jointly and severally to be the lawful attorney or attorneys of the Borrower to do any act or things and to execute any assurance or instrument in the exercise of such powers

which the borrower ought to do or execute and to exercise all the powers of the borrower in carrying out or effecting any of the powers hereby conferred upon the debenture-holder or receiver."

Clearly the above provision gave the Receivers/Mangers the power of attorney. In my view there was no need for the respondent to execute a separate power of attorney after it had executed the debentures in the above terms. In law Receivers are treated as agents or attorneys of the borrower. See *Re: B Johnson & Co (Builders, Ltd [1955]*

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2 ALL ER 775 at 779; *Gomba holdings (UK) Ltd v Timories Finance Ltd [1989] ALL. E. R. 261 at 263* and *Household Centre Ltd v Achelis (Kenya) Ltd [1967] E. A 823*. There is also the decision of the Supreme Court in the two consolidated cases of *Grindlays Bank (U) Ltd v Uganda Bottlers Ltd*, Civil Appeal No. 29 of 1995 and *Kampala Bottlers Ltd v Uganda Bottlers Ltd*, Civil Appeal No. 16 of 1996 which dealt with the point.

In *Grindlays Bank (U) Ltd v Uganda Bottlers (Supra)*, like in the instant case, the Bank advanced a loan to *Kampala Bottlers*. The loan was secured by a debenture which was registered at the Registry of Companies but not at the land Registry, although the title was noted on the title deed. Upon default on the loan Receivers were appointed. They then sold and transferred the securities (land) to *Kampala Bottlers (ltd)*. *Uganda Bottlers Ltd* then sued the Bank in the High Court, alleging that the sale was null and void on the ground of fraud and breach of the Mortgage Decree. The High Court rejected the claim but allowed the suit on the ground that the appointment of the Receivers was illegal as it had not been done in writing as required by the Mortgage Decree.

The Supreme Court held, quite rightly in my view, that the Mortgage Decree did not apply to the transaction as the debenture was not registered at the land Registry but at the Registry of Companies. The Supreme Court then reviewed the evidence and came to the conclusion that in fact the Receivers had been appointed in writing. It held farther, and this is significant, that even if the Receivers had been invalidly appointed, that fact in itself would not defeat the title of a registered proprietor in absence of fraud against that proprietor. And so the debentures in the instant case which were registered at the Companies Registry did not create equitable mortgages under the mortgagees Decree and the Registration of Titles Act. They created legal mortgages under the Companies Act. The correct position seems to me therefore to be that the sale and transfer was done by attorneys of the respondent duly mandated under the legal charge which was registered at

the Companies Registry. There can be no doubt that the charges crystallised upon the appointment of the Receivers/ Managers. The answer to the sole issue framed by the parties should have been that the sale and transfer would have been effectual unless it was fraudulent, an issue raised by the judge and which I will now consider.

* *I*

As already noted in this judgment, fraud was alleged against the first appellant only. Surprisingly, fraud was not framed as an issue. And the learned trial judge found that fraud had been proved by implication. Now an allegation of fraud is certainly a grave matter as it denotes, among other things, dishonesty, criminal deception, swindle or imposture, hence the requirement in law that fraud must not only be specifically pleaded but it must be strictly proved. There is no such thing as constructive fraud. The burden of proof is not one beyond reasonable doubt but one more than a mere balance of probabilities; see *Patel v Makanji* [1957] E. A. 314; *Kampala Bottlers Ltd vs Uganda Bottlers Ltd* (supra); *Okello v UNEB*, Civil Appeal No 12 of 1997, Supreme Court (unreported); *Lubega v Barclays Bank (U) Ltd*, Civil Appeal No 2 of 1992, Supreme Court (unreported); *Kampala Bottlers Ltd v Damanico (u) Ltd* Civil Appeal no*22 of 1992, Supreme Court (unreported, and Order 6 rule 2 of the Civil Procedure rules.

The trial Judge dealt with the matter of fraud and stated as follows:

" Did the plaintiff adduce any evidence to prove fraud? **I think** it did. ?There was the evidence of PW1 (Karibwende) who produced seven registers and seven transfer instruments in respect of the suit property. The entries in these documents speak volumes of how the transactions were **earned** out. The entries on the registers show that G. M. Combined became the registered proprietor of the suit lands on 12th of July 1990 and it lost its registration to A. K. Detergents (u) ltd on the 24th day of March 1994. This was barely three months after the appointment of receivers. The transfer instruments were executed by **Fulgensius** Mungereza and Erienza Kaggwa as Joint-Receivers and Managers for G. M. Combined (u) ltd. They transferred by virtue of their appointment dated 13/12/93. These instruments did not state the consideration concisely as required by section 91 (2) of the RTA. There was no caveat lodged to support the equitable mortgage as required by section 138 (supra). The first defendant did not testify."

She then concluded that all the appellants had colluded to deprive the respondent of the suit lands and also to deny it the right of redemption. With respect to the learned judge the above finding regarding fraud was not justified on the evidence before her. The respondent's sole witness, Karibwende, said nothing about the alleged fraud. He was not even asked about it. Mr. Ogule who testified for the defence was not cross-examined regarding the alleged fraud. It is also note-worthy that in his final address to the court counsel for the respondent did not say a word about the alleged fraudulent sale and transfer. The main point of his submission was that the charges had not crystallised in the suit property.

It was incumbent on the respondent to establish the acts of fraud as per its plaint. The first appellant was not obligated to prove that its registration as proprietor was not fraudulent, as the trial judge appears to have thought. Assuming that fraud could be found by implication, it cannot

be said that the instances relied on by the trial judge amounted to fraud. The fact that the Receivers/Managers sold the suit lands within three months of their appointment cannot in my view amount to a fraudulent act. The matter of consideration is easily explained by the fact that the instruments of transfer clearly indicated that the consideration was stated on the Sale Agreement. I cannot comprehend why the respondent chose to put in evidence the transfer instruments but not the accompanying Sale Agreement. I also think that in the circumstances the trial judge ought to have called for the Sale Agreement in order to determine the point. In any case there was the uncontroverted evidence of Mr. Ogule that the Receivers/Managers had sold the suit land to the first appellant. Even in its plaint the respondent admits that there was a sale for consideration, albeit inadequate. And as Karibwende stated in this court under cross-examination by counsel for the respondent, the Agreement of Sale (which he produced in court) shows the consideration as United States Dollars 1,891,000. The respondent who seems to have deliberately kept this vital evidence out of court should not have been heard to complain about the matter.

- I do not see that the trial judge was right to hold the appellants guilty of collusion. In its plain meaning the word collusion may be said to mean an agreement between two or more persons to act to the prejudice of a third party or for an improper purpose. There is no evidence on record to show that there was such an agreement on the part of the appellants. Clearly as a bona fide purchaser for value, the first appellant's title could only be impeached on grounds of fraud. I see no fraud or collusion in the case before us.

i *

The registration of the first appellant was not "shrouded in mystery". It was effected by the third and fourth appellants as Receivers/Managers of the respondent with full powers to sell and transfer the respondent's immovable assets which included the suit lands. I do not see it that even in the case of an equitable mortgage with an express power of attorney authorising conveyance of the estate, it is necessary for the equitable mortgage to be first turned into a legal mortgage before the Receivers can exercise the power of sale. Be that as it may, in this case the debenture holders were not equitable mortgagees. As was [&] pointed out by Fox L, J in Gomba Holdings (UK) Ltd (supra) and quite rightly so in view, the agency of a Receiver is not an ordinary one; it is intended to protect a mortgagee or debenture holder. That is why the mortgagee is given powers to effect the mortgagor's position and fulfil the mortgage as would the mortgagor. Otherwise of what use would be the debenture?

I think that the trial judge was in error to hold that the charge may crystallise but the Receivers may not deal with the property without further authority from the mortgagor or through a court order. What happened here was that the debenture holders did not foreclose but only appointed Receivers/Managers under the debentures. It must have been because of the trial judge's misconception of the matter that she invoked the principle of equity of redemption.

In view of the foregoing I would allow the appeals, set aside the judgment and orders of the trial judge and substitute therefor an order dismissing the respondent's suit against

the appellants. I would award the appellants costs here and in the High Court. As Okello, JA and Twinomujuni, JA agree, it is so ordered.

DATE at Kampala this /[^]day of September, ¹⁹⁹⁸

o

S. T. MANYINDO DEPUTY CHIEF JUSTICE

Mr. Didas Nkuruziza for the 1st appellant present.

Mr. Mubiru - Kabenge for the 2nd, 3rd and 4th appellants and holding a brief for Prof. Sempebwa for the 5th appellant.

Mr. Kavuma-Kabenge for the Respondent. Mr. Nduhura Eliphaz, the Court Clerk.

Mr. D. Nkuruziza: We are here to receive the judgement.

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Court: Judgement delivered in Court in the presence of parties. Right of appeal explained to the parties.

Cl ^v Murfingira J. <1

15 September 1998 REGISTRAR COURT OF APPEAL

THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA

MOLDEN AT RAMPALA

CORAM3

HON. MR. JUSTICE MANYINDO, DCJ, HON. MR. JUSTICE G. M. OKELLO, J. A, AND HON. MR. JUSTICE A. TWINOMUJUNI, J. A.

CIVIL APPEAL NO. 17 OF 1998

BETWEEN

| A. K. DETERGENTS LTD. | |

|-----|-----|

| 2. DEVELOPMENT FINANCE COMPANY OF UGANDA LTD.] | |

| 3. FULGENZIO MUNGHEREZA | \$:\$::::APPELLANT |

| 4. ERIEZA KAGGWA | |

| 5. UGANDA DEVELOPMENT BANK | |

AND

G. M. COMBINED [U] LIMITED:.....RESPONDENT

[Appeal from the Judgment of the High Court at Kampala before the Hon. Lady Justice C. K. Byamugisha dated 22nd April, 1998 in HCCS No. 348 of 1994].

JUDGMENT OF OKKLO. J. A.

I agree fully with the Judgment of Manyindo, DCJ and have nothing to add.

Dated at Kampala this.....

OKELLO . M JUSTICK OF APPEALS

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 17 OF 1998

A. K. DETERGENTS LTD & OTHERS

VERSUS

G. M. COMBINED (U) LTD.

JUDGMENT OF TWINOMUJUNI, J. A.

I have had the advantage of reading the judgment in draft of my Lord, Manyindo, D. C. J. I agree entirely with the judgment and in particular that the first appellant was a bonafide purchaser for value, that his title could only be impeached on grounds of fraud. There is no evidence of fraud or collusion in this case.

I also agree with orders proposed by him that the appeal be allowed, judgment and orders of the trial judge be set aside and be substituted by an order dismissing the respondents suit against the appellant. I would also award to the appellants costs here and in the High Court.

Dated at Kampala this 15th day of September, 1998.

A. Twinomujuni Justice of Appeal.

I certify that this is the true copy of the original.

Mjrangir[^]JJ. Registrar Court of Appeal. 18/9/1998.

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Prepared on 14 October 2026 · Esheria