

UGANDA / JUDGMENT

Bukenya v DFCU Bank Ltd & Anor (Civil Suit No. 267 of 2015) [2016] UGCommC 50 (10 June 2016)

[2016] UGCommC 50

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Civil Suit No. 267 of 2015

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THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 267 OF 2015

SARAH BUKENYA}..... PLAINTIFF

VS

1. DFCU BANK LTD}

2. ROSE NAJJEMBA}..... DEFENDANTS

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This is a ruling arising from a preliminary point of law agreed to by the parties in the joint scheduling memorandum executed by Counsels of both parties. It was agreed by Counsels of the parties that the point of law for determination is whether the Plaintiff's action is barred by the statute of limitation. The Plaintiff is represented by Counsels David Kaggwa and Sam Ogwang of Messieurs Kaggwa and Kaggwa advocates and the first Defendant is represented by Counsel Isaac Bakayana of Messieurs Arcadia advocates. In a joint scheduling memorandum signed by Counsels of the parties on the 2nd and 3rd of March 2016 respectively the first issue agreed upon is whether the Plaintiff's suit is bad and barred in law? The relevant documents to determine the issue were agreed to and are part of the points of agreement in the joint scheduling memorandum.

The question as to whether a suit is barred by the statute of limitation is a preliminary point of law that goes to the jurisdiction of the court to try the action at all and under Order 15 rule 2 of the Civil Procedure Rules where issues both of law and fact arise in the same suit and the court is of the opinion that the suit or any part of it may be disposed of on issues of law only, it shall try those issues first and for that purpose may if it thinks fit postpone the settlement of the issues of fact until after the issues of law have been determined. In this particular case the question of limitation does not require the taking of evidence as it is a point of law that arises from the pleadings under Order 7 rule 11 (d) of the Civil Procedure Rules which provides that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. The preliminary objection relies on more than a perusal of the plaint and also relies on evidence admitted in the scheduling memorandum and therefore the suit may be determined under Order 6 rule 28 of the Civil Procedure Rules. Order 6 rule 28 provides that any party shall be entitled to raise by his or her pleadings any point of law, and any point of law so raised shall be disposed of by the court at or after the hearing except that by consent of the parties or by the order of the court on the application of either party, a point of law may be set down for hearing and disposed off at any time before the hearing. In this case in addition to raising the preliminary point in paragraph 13 of the written statement of defence, it is also agreed as an issue for determination in the joint scheduling memorandum.

In paragraph 4 of the plaint, the Plaintiff avers that it's cause of action against the Defendants jointly and severally is for a declaration that the first Defendant breached the terms of the mortgage agreement when it sold the Plaintiffs property to the second Defendant, a declaration that the Plaintiffs property comprised in Kyadondo Block 265, Plot 2353 at Bunamwaya was illegally and fraudulently sold to the second Defendant, an order of cancellation of the second Defendant's title and the reinstatement of the Plaintiff as the registered proprietor thereof. In the alternative the Plaintiff prays for an order directing the first Defendant paid to the Plaintiff the current market value of the suit property at the time of judgment, an order of vacant possession and return of this suit certificate of title, aggravated damages, general damages and costs of the suit.

The court was addressed in written submissions and briefly the first Defendant's objection to the suit is that the Plaintiff's action is barred by the law of limitation and this is pleaded in paragraph 13 of the written statement of defence. It relies on section 3 (1) of the Limitation Act for the submission on the point of law that actions founded on contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action arose.

In the crux of the submission is that section 3 (1) of the Limitation Act should be given a literal meaning which implies that actions founded on contract cannot be brought after the expiration of six years from the date the cause of action arose. The Defendants Counsel submitted that any cause of action was basis is a contract cannot be sustained after six years from the date the cause of action arose. He relies on the decision of this court in **Western Highland Creameries, Lee Ngugi versus Stanbic Bank Uganda Limited, Michael Mawanda, Alpha Dairy Products Limited HCCS Number 462 of 2011**. He contended that in this suit it was determined that a suit premised

on the loan secured by a debenture and the mortgage the cause of action against the first and second Defendants would only arise from the relationship of the lender/borrower governed by the security instruments and is founded on contract. That the Plaintiff's cause of action was founded on the rights and obligations expressly contained or implied in the contract between the parties and was barred by the law of limitation having been brought more than six years from the date the cause of action arose. The first Defendants Counsel submitted that the Plaintiff's entire claim is solely based on contract.

To support the contention that the Plaintiffs cause of action is solely based on contract, the first Defendants Counsel referred to paragraph 4 of the plaint which seeks a declaration that the first Defendant breached the terms of the mortgage agreement when it sold the Plaintiffs property. Furthermore in paragraph 5 (a) of the plaint, it is averred that the Plaintiff obtained various credit facilities from the Plaintiff in the aggregate sum of Uganda shillings 200,000,000/= and pull the annexure attached is an agreement with the Defendant bank. Secondly in paragraph 5 (b) of the plaint the Plaintiff refers to mortgage deeds which are annexed to the plaint. The mortgage deeds to the form of an agreement which contained various terms and conditions and which were agreed to by the Plaintiff and the bank. The Plaintiffs claim is based on the credit facility agreement and mortgages and indeed the claims in paragraph 5 (c), (d) – (g) of the plaint confirms that the entire claim is based on the terms and conditions of the agreement she refers to in the previous paragraphs. In the premises that claim cannot stand without reference to the credit facility agreement and the mortgage deeds.

The Defendants Counsel further submits that the written statement of defence of the first Defendant paragraph 4 (a) – (e) confirms that the entire dealings between the parties is governed by contract. Thirdly issues number one and two framed by the parties for trial in the joint shilling memorandum relate to the rights that could only accrue from the mortgage contract between the Plaintiff and the first Defendant. With reference to the joint scheduling memorandum, the parties agreed in paragraph 6.3 that the Plaintiff in 2004/2005 obtained facilities for the Defendant totalling Uganda shillings 200,000,000/= on the terms and conditions mutually agreed to by both parties. In paragraph 6.4 it is further agreed that as security for the repayment of the facility together with interest thereon, the Plaintiff pledged property comprised in Kyadondo Block 265 Plot number 2353. The exhibits in the joint scheduling memorandum from pages 9 – 29 only confirm that the claim is founded on contract. From this agreed documents the whole basis of the Plaintiffs claim is the agreement she entered into with the first Defendant. She cannot make a claim without founding the same on the said contract. In the premises the Plaintiffs claim is based on contract and is barred by the law of limitation and ought to be dismissed with costs.

The first Defendants Counsel also submitted that the Plaintiff's action is not an action for the recovery of land within the meaning of the law. He submitted that the action cannot fit within the provisions of section 5 of the Limitation Act as the Plaintiff has no right at all in law to recover the land and indeed does not seek to do so in her plaint. In paragraph 4 of the plaint refers to prayers seek declarations, and an order to Counsel the second Defendant's title and reinstate her on the title. He contended that these prayers have nothing to do with the recovery of land. Alternatively

the Plaintiff prays for the market value of the property and an order of vacant possession. He contended that the first prayer is not fall within the ambit of recovery of land as envisaged by section 5 of the Limitation Act.

By way of definition of an action for recovery/ejection first Defendants Counsel relies on **Black's Law Dictionary (2009)** at pages 33 and 594. It means a legal action by which a person who wrongfully addicted from property seeks to recover possession and damages and costs. In the action the Plaintiff has to show that if she has title to the land and the Plaintiff has been wrongfully dispossessed and suffered damages. The Plaintiff concedes to borrowing money from the first Defendant and defaulting on repayment of the loan. She does not indicate that she paid the money she owed the bank. In the premises Counsel submitted that the Plaintiff has no further title to the property. Upon admitting borrowing money and not repaying it, she cannot claim that she was wrongfully ejected or that she has any title to the property. She cannot rightly argue that she was wrongfully ejected from the property to bring her action for recovery of land within the ambit of the Limitation Act.

Lastly the first Defendants Counsel relies on the decision of this court in the **Western Highland Creameries Ltd and Lee Ngugi versus Stanbic Bank Uganda Ltd and others** (supra). In that case the court considered an action for recovery of land and held that it meant getting back the recovery of actual possession and also through obtaining registered proprietorship. In the case before the court the Plaintiff seeks variance declarations and only seeks an order for reinstatement on the title without seeking actual possession of the land. The Plaintiff's Counsel contended that the court in the above case in considering the provisions of section 176 of the Registration of Titles Act restated the long accepted principle that title can only be impeached under the section on the grounds which include fraud attributed to the transferee in title. However the Plaintiff makes no single allegation of fraud against the second Defendant. Furthermore, the Plaintiff is no longer a Mortgagor neither is the bank a Mortgagee in respect of this property which was long since sold to the second Defendant. The Plaintiff cannot redeem from the first Defendant what it has long sold to the second Defendant. In other words the Plaintiff no longer enjoys a right to redeem the property. Counsel prayed that the court upholds its own decision in the above case and holds that the Plaintiffs action is founded on contract having been brought after the statutory period of six years and should be dismissed with costs.

In reply the Plaintiff's Counsel submitted that the claim of the Plaintiff is not time barred and the preliminary objections ought to be dismissed with costs and the suit heard on merit. He contended that the Plaintiff is not seeking reliefs under the credit agreement but rather seeks to invalidate the mortgage deed and to recover land under section 176 (c) of the Registration of Titles Act cap 230 laws of Uganda. The suit is related to the company of the suit lands according to section 5 of the Limitation Act where such suits are to be brought before the lapse of 12 years. Consequently the question for determination is whether the Plaintiff's action is one for recovery of land in order for it to qualify for a limitation period of 12 years. He submitted that the term "recovery of land" was defined in the case of **Western Highland Creameries and Another versus Stanbic Bank Uganda Limited HCCS 462 of 2011** to mean getting back the land. Land can be got

back by recovery of actual possession and also through obtaining the registered proprietorship. The averment in the plaint relief (c) seeks an order of cancellation of the second Defendant's title and reinstatement of the Plaintiff as the registered proprietor. Relief (e) seeks for an order of vacant possession and return of the certificate of title. With an order of vacant possession the Plaintiff would be entitled to the physical possession of her property. These reliefs qualify the suit to be a suit for recovery of land under section 176 (c) of the Registration of Titles Act. In paragraph 5 (b) of the plaint, it is averred that as security for a loan, the church was placed, the Plaintiffs property described therein and two mortgages were registered thereon though they were not illegal, null and void for want of execution and attestation. On the basis of the purported powers under the mortgage, the first Defendant sold the property to the second Defendant. Counsel further submitted that the word "proprietor" means the owner whether in possession, remainder, reversion or otherwise of land of a lease or mortgage was name appears or is entered as the proprietor of the land or the lease or the mortgage in the register book. Following the mortgage deed between the Plaintiff and the first Defendant, a mortgage encumbrance was entered on the register.

In the plaint it is averred that both Defendants acted fraudulently hence the Plaintiff is entitled to the reliefs against the first Defendant for its actions as the registered proprietor of the mortgage that led to the second Defendant being registered proprietor thereof. The Plaintiff's right to recover the land cannot be divorced from the first Defendant's entry as the registered proprietor under the mortgage because the second Defendant acquired the suit land arising from the purported transfer from the first Defendant as registered Mortgagee. Section 115 of the Registration of Titles Act Cap 230 provides that the proprietor of any land under the operation of the Act may mortgage that land by signing a mortgage of the land in the form in the 11th schedule to the Act. The 11th schedule shows that both the Mortgagor and Mortgagee was signed the mortgage and the signatures must be witnessed by legally authorised attesting witnesses such as advocates the mortgage deed was not attested and once the parties like the ones in this case sign the mortgage which does not comply with the provisions of the Registration of Titles Act, it amounts to breach of the statutory duty and not a breach of contract.

Counsel relies on the case of **Frederick Zaabwe verses Orient Bank Ltd and Five Others SCCA Number 04 of 2006** where Katureebe JSC found that the mortgage deed contravened the provisions of the Registration of Titles Act and the bank, the purchaser and the borrowers acted fraudulently in the manner in which the appellant lost his property. Furthermore in **General Parts (U) Ltd versus NPART SCCA Number 5 of 1999** the Supreme Court emphasised the legal requirement for signatures on instruments created under the Registration of Titles Act to be witnessed by an attesting witness, shop in which they are invalid, null and void. In both of these cases, the Supreme Court was interpreting the statutory provisions of the Registration of Titles Act but not enforcing contracts.

The Plaintiff's Counsel submitted that the findings of the Supreme Court were not based on breach of contract but breach of ceRegistration of Titles Actin provisions which entitled the appellant to recover her land under section 176 (c) of the Registration of Titles Act. Where the

transferee acquires title through a joint fraudulent effort with the bank; both parties must be made parties to the suit for recovery of the land. In the circumstances it is not true as submitted by the first Defendant's Counsel that the action arises from the contract. It is also not true that the plaintiff does not attribute fraud on the second Defendant. The plaintiff discloses that he bought the land at an excessively low price which was in bad faith and fraudulent. These facts were not denied by the second Defendant who did not file a written statement of defence. In the premises the facts in the suit are distinguishable from the case of **Western Highland Creameries and Another versus Stanbic Bank Uganda Limited** (supra) where the Shumuk Properties Ltd was not a party to the suit hence it was held that it did not amount to a suit for recovery of land. The Plaintiff's Counsel further submitted that the above suit is distinguishable because the Plaintiff is not seeking reliefs for removal of a receiver under the debenture which is the security instruments created under the Companies Act. In the instant case however the Plaintiff seeks to recover her land which was sold under an illegal mortgage and under fraudulent actions of both Defendants in the concert. The particulars of fraud and illegality are attributed to both Defendants.

The Plaintiff's Counsel relies on the pleadings of fraud and illegality and particulars thereof showing that the property was sold below its market and forced sale value. By virtue of valuation by the Defendants own valuation surveyor the property was valued at Uganda shillings 190,000,000/= by the first Defendant sold it at a paltry 85,000,000/= shillings in 2006. The Plaintiff's Counsel further relies on the case of **David Sejjaka Nalima vs. Rebecca Musoke SCCA No. 12 of 1985** for the proposition that where the purchaser suspicions are rules that he abstained from making inquiries for fear of learning the truth, fraud may be properly ascribed to him or her and he or she cannot claim the protection accorded to a bona fide purchaser for value without notice of fraud. Furthermore in the case of **Prof Daniel David Ntanda Nsereko vs. Barclays Bank of Uganda and 2 others HCCS number 18 of 2009**, it was held by Honourable Justice Kwesiga that the buyer of the suit property was not a bona fide purchaser for value without notice because he had a duty to satisfy himself that the mortgage was proper. He submitted that where an excessively low price is paid for property, it renders the transaction to have been done in bad faith. By the second Defendant's failure to file a defence, the doctrine of bona fide purchaser for value without notice is not available to her. The first Defendant cannot plead it and can only explain its participation in the fraudulent sale of the suit property to show why the land cannot be recovered through a full trial.

Finally Counsel submitted that a perusal of the mortgage deed agreed to in the joint scheduling memorandum demonstrates that it was not attested to by unauthorised persons as required by section 147 of the Registration of Titles Act. Therefore the mortgage in essence is null and void. In the case of **MacFoy versus United Africa Company Ltd [1961] 3 ALL ER 1169** Lord Denning held that if an act is void, then it is a nullity in law. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside and it is automatically null and void without much ado though it is sometimes convenient to how the court declare it to be so. Every proceeding which is funded on it is also bad and incurably bad. One cannot put something on nothing and expect it to stay there. With reference to the facts and circumstances of this case the Plaintiff's

Counsel submitted that it was wrong for the first Defendant to assert that the equity of redemption was extinguished the moment the property was sold to the second Defendant and therefore the Plaintiff cannot recover. Having established that the underlying mortgage was null and void, the subsequent transfer to the second Defendant is a nullity. With regard to the prayer for recovery of damages sustained through deprivation of land, it is an alternative remedy in the case recovery of land fees and it would be prejudicial to determine it before the hearing. In conclusion the Plaintiff's Counsel asked the court to overrule the objection with costs.

Ruling

I have carefully considered the submissions. The question is whether the suit is barred by the statute of limitations under section 3 of the Limitation Act Cap 80 Laws of Uganda on the premises that the Plaintiff's action is founded on contract and ought to have been brought within six years from the date the cause of action arose. If the court finds that the Plaintiff's action is founded on contract, the fact that the action was brought after six years is not in controversy. On the other hand the Plaintiff's defence is that the suit is not based on contract but is an action for recovery of land and the limitation period thereof is 12 years under section 5 of the Limitation Act Cap 80 laws of Uganda. If the court finds that it is an action for recovery of land it is also not in controversy that the action was commenced within 12 years and before its expiry and would not be caught by the law of limitation. Alternatively the Plaintiff's Counsel maintains that the underlying transaction is an illegality and any subsequent transactions based on the illegality cannot stand.

The question of whether the Plaintiff's action is based on contract or is an action for recovery of land can be considered from the plaint as well as from legal doctrine as to whether a cause of action by a Mortgagor against the Mortgagee can be called an action for recovery of land. There is some controversy about whether this is an action by a Mortgagor against the Mortgagee flowing from the submission that the mortgage deed executed between the parties is a nullity for not being attested by the authorised persons. Last but not least if this is an action by a Mortgagor against the Mortgagee and a transferee in title, the issue is whether there is a cause of action against the first Defendant who is the Mortgagee that sold the property to the second Defendant and whether there is a cause of action in fraud within the meaning of section 176 of the Registration of Titles Act that needs to be heard before the final determination of the controversy.

There is no controversy about the limitation period prescribed by section 3 (1) (a) of the Limitation Act Cap 80 Laws of Uganda which provides that actions founded on contract or tort shall not be brought after the expiration of six years from the date on which the cause of action arose. In the premises I do not need to dwell on the submission that no action shall be brought on a cause of action in tort or contract after the expiration of six years from the date on which the cause of action arose. That is granted. What is in controversy is whether the Plaintiffs action is founded on a cause of action for recovery of land for which limitation period would be 12 years from the date the cause of action arose under section 5 of the Limitation Act. Section 5 of the Limitation Act provides that no action shall be brought by any person to recover any land after

the expiration of 12 years from the date on which the right of action accrued. The question is therefore whether the Plaintiff's action is a suit for the recovery of land as envisaged by section 5 of the Limitation Act Cap 80 Laws of Uganda. For that reason any action for recovery of damages for breach of contract can be the subject matter of the limitation period of six years depending on the facts and circumstances.

The Plaintiff's Counsel submitted that there was breach of statute or breach of statutory provisions and he quoted the case of **Frederick Zaabwe vs. Orient Bank Ltd and five others SCCA Number 04 of 2006** as well as the case of **General Parts (U) Ltd vs. NPART SCCA Number 5 of 1999**. Before considering the limitation period for breach of statutory provisions, I have carefully reviewed the above two authorities. The case of **Frederick Zaabwe verses Orient Bank and five others** (supra) the matter revolved around whether the power of attorney given by the appellant authorised the mortgaging of his property or the giving of this property as security on behalf of the donee and not for the benefit of the donor? It was held that the donee could not use the power of attorney for his benefit. In other words the acts of the agent were outside the scope of the power of attorney and were not even capable of ratification by the principal. The court held that the bank had clear notice of the power of attorney to establish for what purpose the loan was going to be put. They only discussed the loan account of the second respondent with the Plaintiff/appellant after the second respondent failed to pay the loan sum. The two respondents were held liable to the appellant for the loss he incurred.

Secondly the court looked at the execution of the mortgage deed. The attested witnesses did not give the names of the person signing or their capacity. The registrar of title could not know the capacity of the witness to the instruments as provided for by the Registration of Titles Act. The court held that the attestation was in breach of the relevant provisions of the Registration of Titles Act. The court allowed ground two of the memorandum of appeal. Ground two was whether the learned justices of appeal erred in law in that they held that the mortgage against the applicants land was valid when it did not comply with the provisions of the law.

On the question of whether there was fraud on the part of the respondents, the court held that the second respondent acted fraudulently. They had a clear intention to defraud the appellant of his legal rights to property. The bank was the first respondent and was the Mortgagee. The second respondent obtained the power of attorney and certificate of title for mortgaging from the appellant. So the transaction of the mortgage between the two parties was void on account of fraud. There was a caveat on the title by the time the third-party bought the property. The same law firm Messieurs Shonubi Musoke and company advocates acted in all the subsequent transactions and were aware that the appellant was alleging fraud in the mortgaging of his title. He noted that the third-party knew or had notice of allegations of fraud by the appellant. Transfer to Ali Hassan was conducted irregularly.

The above suit dealt with recovery of land with a claim for compensation for deprivation of property and for exemplary damages. No question of limitation was ever raised in the suit and the judgment does not provide guidance to the court on the issue before this court. Secondly there was no holding on the cause of action of breach of statutory provisions. The period within

which the suit was filed from the date the cause of action arose does not apply since the action was brought within six years. The power of attorney was executed on 7 November 1996. The appellant was evicted on the 19th of May 1999 and the suit was filed in the High Court soon thereafter.

Secondly I have considered the case of **General Parts (U) Ltd vs. NPART** (supra) which appeal was also referred to and considered in the case of **Frederick Zaabwe vs. Orient bank** and others (supra). The question before the court was whether the mortgage was not executed in accordance with section 148 of the Registration of Titles Act. The judgment of Mulenga JSC in **General Parts (U) Ltd versus NPART** (supra) concerned a second appeal from a suit filed in the High Court where Uganda Commercial Bank (UCB) sued General Parts (U) Ltd. UCB sought a declaration that it had properly appointed a receiver/manager. Among other matters considered by the Supreme Court was whether the mortgage was duly executed. The determination of that controversy would deal with the question of whether a receiver was duly appointed under the mortgage instrument. The court found that the mortgage deed executed did not comply with the statutory provisions. There is no question of limitation or breach of statutory provisions as a cause of action in the context of the limitation period thereof.

Breach of a statutory duty is a tort according to the case of **Dawson and Co versus Bingley Urban District Council** [1911] 2 KB 149. However the cause arises where the statute is for the benefit of an individual or class of individuals for whom a statutory duty is created. Where there is failure to follow a statutory provision such as in the case of a requirement for attestation, what is the cause of action? Is it in tort or in contract? The simple answer is that the requirements of the statute has to do with what to do in the execution of an instrument and may be about the requirements for the validity of the instrument. Where the formal requirements are not complied with, the question to be considered is whether the instrument is duly executed or not. Where the contention is whether the instrument is duly executed or not is there a limitation period? Where a person says that a contract was not duly executed, is the cause of action not in contract? It amounts to a submission that there was no valid contract. Secondly it may be asserted that the contract is a nullity. This flows from a submission that what is noncompliant with the formal requirements of a statute is a nullity. I will briefly refer to principles of statutory interpretation to consider whether the relevant provision of the Registration of Title Act namely section 115 is mandatory or directory and whether the impugned mortgage deed which does not comply with the Eleventh Schedule of the Registration of Titles Act and therefore whether the mortgage is a nullity or not. In the case of **Cullimore vs. Lyme Regis Corporation** [1961] 3 All ER 1008 **Edmund Davies J** at page 1011 held that the question:

“whether these provisions are mandatory or directory depends on the Act as a whole without reference to the particular facts in this case. ...

...those general principles are conveniently stated in summary form in Maxwell On Interpretation Of Statutes (10th Edn), at p 376:

"It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment ..."

Halsbury's Laws of England Vol. 44 (1) (2005) Reissue paragraphs 1238 lays down the general principles for determining whether a provision couched in mandatory terms is mandatory so that acts done in disregard are void or directory and the acts done in disregard of the provision may be saved. It provides that:

"The distinction between mandatory and directory enactments concerns statutory requirements and may have to be drawn where the consequence of failing to implement the requirement is not spelt out in the legislation. The requirement may arise in one of two ways. A duty to implement it may be imposed directly on a person; or legislation may govern the doing of an act or the carrying on of an activity, and compel the person doing the act or carrying on the activity to implement the requirement as part of a specified procedure. The requirement may be imposed merely by implication. To remedy the deficiency of the legislature in failing to specify the intended legal consequence of non-compliance with such a requirement, it has been necessary for the courts to devise rules. These lay down that it must be decided from the wording of the relevant enactment whether the requirement is intended to be mandatory or merely directory. ...The court will be more willing to hold that a statutory requirement is merely directory if any breach of the requirement is necessarily followed by an opportunity to exercise some judicial or official discretion in a way which can adequately compensate for that breach. Provisions relating to the steps to be taken by the parties to legal proceedings (using the term in the widest sense) are often construed as mandatory. Where, however, a requirement, even if in mandatory terms, is purely procedural and is imposed for the benefit of one party alone, that party can waive the requirement."

I have considered section 115 of the Registration of Titles Act in light of its wording and the conclusion is that it only provides that the proprietor of any land may mortgage that land by signing a mortgage of the land in the form in the Eleventh Schedule to the Act. Counsel for the Plaintiff submitted that the mortgage deed was not attested and was therefore a nullity. However section 115 of the Registration of Titles Act is not couched in mandatory terms and its requirements for a mortgage to be in the form in the Eleventh Schedule is not mandatory. It provides that:

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

The provision is not mandatory. It only permits the proprietor of any land registered under the Registration of Titles Act to mortgage his or her land by signing a mortgage in the prescribed form. However a mortgage does not have to be in the prescribed form. In other words failure to sign a mortgage in the prescribed form does not per se render the mortgage agreement null and void per se. The provision deals with how to create a charge on registered title as notice to the public of the existence of a mortgage. To be specific the Mortgage Act cap 229 (repealed) which was the enactment in operation on 1 July 2004 when the mortgage agreement was executed

defines a mortgage to mean any mortgage, charge, debenture, loan agreement or other encumbrance, whether legal or equitable which constitutes a charge over an estate or interest in land in Uganda or partly in Uganda and partly elsewhere and which is registered under the Act. The mortgage is either a legal mortgage or an equitable mortgage. The definition includes a loan agreement or other encumbrance whether legal or equitable which constitutes a charge over registered land. It has to be registered under the Registration of Titles Act cap 230 for purposes of notice only. Taking the analysis of the provisions of the Registration of Titles Act, the mortgage when registered has effect as security but does not operate as a transfer of the land mortgaged (see section 116 of the Registration of Titles Act cap 230). Secondly section 129 of the Registration of Titles Act provides that notwithstanding anything in the Act, an equitable mortgage of land may be made by deposit by the registered proprietor of his or her certificate of title with an intention to create a security thereon whether accompanied or not by a note or memorandum of deposit. An equitable mortgage shall be deemed to create an interest in land. The equitable Mortgagee is required to cause a caveat to be entered on the certificate of title to make the land subject to the mortgage interest.

What is the purpose of the enactment namely the provisions of the Registration of Titles Act cap 230 on the creation and registration of mortgages? The intention of legislature is clearly reflected in sections 115, 116 and 129 (3) of the Registration of Titles Act cap 230 and is to ensure that members of the public have constructive notice of an equitable or legal mortgage through registration of an encumbrance on the title. The provisions are meant to protect third parties and not the parties to the contract. Sections 115, 129 and the Eleventh Schedule to the Registration of Titles Act has now been repealed by section 44 (1) of the Mortgage Act, Act 8 of 2009. Notwithstanding the repeal the contract of the parties was made in 2004 before the repeal and is binding under the transitional provisions of the Mortgage Act 2009.

The contract remains binding on the parties irrespective of the form of mortgage registered so long as it is a binding contract. I will further consider the effect of the contract on the parties. Suffice it to conclude that section 115 of the Registration of Titles Act deals with the execution of a mortgage in the form provided for in the Eleventh Schedule by the Mortgagor. The provision is permissive and does not preclude the Mortgagor from making a deposit of a certificate of title with the Mortgagee and creating an equitable mortgage under section 129 of the Registration of Titles Act. Secondly a mortgage in the Eleventh Schedule form is executed by a Mortgagor and not Mortgagee at all and it does not require the signature or input of the Mortgagee in the creation of the mortgage in the prescribed form. For emphasis a mortgage in the prescribed form is executed by the Mortgagor only and it is like a power of Attorney and its validity arises from the power of the proprietor to deliver his or her title as security for a loan. However the contract to execute a mortgage may be found in the facility documents i.e. the loan agreement. A submission that the mortgage deed was not duly executed is a submission that the Mortgagor did not do his or her part of the bargain contained in the mortgage or loan agreement. The form in the Eleventh Schedule does not require the signature of the Mortgagee or lender at all. Last but not least on this point no mortgage was created as envisaged by section 115 and the Eleventh Schedule to the Registration of Titles Act and therefore what was registered is an agreement

which could have been annexed to the prescribed form mortgage.

What of the allegation that the execution of the mortgage was an illegality? The principles to be applied were considered by Devlin J in **St John Shipping Corporation v Joseph Rank Ltd [1956] 3 All ER 683**. He held that:

“There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends on proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it. ... The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. A significant distinction between the two classes is this. In the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, one has to consider not what acts the statute prohibits, but what contracts it prohibits; but one is not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable.

Considering the facts the object of the mortgage was not to commit an illegal act and none can be imputed on the parties. Secondly the contract was not prohibited by statute. The contract which was registered is an agreement between two parties. It is not the mortgage form for registration to be executed by the Plaintiff only and attested. Was the registration of a charge illegal? No. This is because the law allows mortgage by deposit of title deeds and the lodging of a caveat as notice to the world of the existence of a Mortgagee's interest. A charge once registered is notice to the world of the interest. Section 46 (2), (3) and (4) of the Registration of Titles Act provides that:

“46. Effective date of registration; the duly registered proprietor.

- (2) Every instrument purporting to affect land or any interest in land, the title to which has been registered under this Act, shall be deemed to be registered when a memorial of the instrument as described in section 51 has been entered in the Register Book upon the folium constituted by the certificate of title.
- (3) The memorial mentioned in subsection (2) shall be entered as at the time and date on which the instrument to which it relates was received in the office of titles together with the duplicate certificate of title and such other documents or consents as may be necessary, accompanied with the fees payable under this Act.
- (4) The person named in any certificate of title or instrument so registered as the grantee or as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate or instrument shall be deemed and taken to be the duly registered proprietor of the land.”

Because there are third party interests involved the question of whether they are not protected can be tried. Secondly the duty to issue a mortgage according to the prescribed form is that of the Mortgagor. The registration can be considered on the alleged fraud.

Furthermore upon a perusal of some of the authorities, none of them conclusively deals with the question of the execution of the mortgage contrary to the statutory provisions. For instance the mortgage deed in this particular matter was purportedly executed by the Plaintiff and witnessed by someone called Nagadya Salome without indicating her capacity. Even if the formal requirements of the law were not complied with, there is no doubt that the borrower, borrowed money after deposit of title with the lender. It is either a legal mortgage or an equitable mortgage. Secondly none of the above authorities address the question of limitation of actions and I would consider the matter with reference to the pleadings and the causes of action in the suit. Before I do so, I must add that the Mortgagor cannot be an aggrieved person for failure to execute a mortgage in the prescribed form because this is his or her duty if any under any agreement to execute a mortgage. In this case the pleadings disclose that the Plaintiff executed a mortgage agreement or mortgage deed on the 1st of October 2004. It is not the mortgage envisaged under section 115 of the Registration of Titles Act cap 230. By the agreement and clause 1 thereof the Mortgagor mortgaged all her estate and interest in the suit property. What remained was for her to execute a mortgage in the form prescribed in the Eleventh Schedule of the Registration of Titles Act cap 230 for purposes of registration of a charge on the title only while the agreement or mortgage deed operated like a loan agreement and is a valid document that is enforceable. There is another Mortgage deed also dated 19th of July 2004. The Eleventh Schedule to the Registration of Titles Act cap 230 is like a caveat form. It is only meant to show that the Mortgagor has mortgaged his or her property. It is a one page document. The mortgage deed however is a multiple page document reflecting the agreement between the parties. The mortgage form which is prescribed requires only the Mortgagor's signature as witnesses. In the premises the mortgage agreement which in truth and substance is an agreement between two parties is not meant to be lodged with the registrar though it may be annexed to the form prescribed to reflect the agreement of the parties. The Plaintiff would be barred by the doctrine of estoppels by agreement from asserting that she had not mortgaged her property. She did so by contract. As to whether she executed the requisite statutory form for purposes of registration of a charge is her duty and not that of the Defendant and she cannot raise her own breach or illegality against the Defendant. The duty of the Defendant was to have their interest noted on the register of titles. My conclusion is supported by the holding of the Supreme Court in **Active Automobile Spares Ltd vs Crane Bank Ltd and Rajesh Pakekh** Civil Appeal No. 21 of 2001 and the judgment of Oder J. S. C citing with approval the holding of A. L. Smith L. J. in **Scott vs Brown (1892) 2 QBD 724** that: "a Plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the court will not assist him." In this case the Plaintiff who claims that the mortgage was executed contrary to the stipulation under section 115 of the Registration of Titles Act Cap 230 and the form in the Eleventh Schedule thereof. The form does not require the first Defendant bank to do anything. It only requires the Plaintiff with the requisite attestation to execute a mortgage for registration. In the premises though I do not agree that there was an

illegality in the mortgage agreement, the Plaintiff cannot rely on her own alleged illegality to found a cause of action. On the basis of the pleading the cause of action cannot stand. Secondly the cause of action would have been based on breach of an agreement to mortgage the property in issue for securing the money which according to the pleadings was borrowed by the Plaintiff. Last but not least the document annexed is a mortgage agreement which is akin to a loan agreement falling within the definition of a mortgage under section 1 of the Mortgage Act Cap 229 (repealed) which was the law prevailing at the time of the transaction. On the above premises alone the allegation of any want of form is based on a contractual requirement and is time barred.

What is disclosed in the Plaintiff? Paragraph 4 of the plaintiff avers that the Plaintiff's cause of action against the Defendants jointly and severally is for declaration that the first Defendant breached the terms of the mortgage agreement when it sold the Plaintiffs property to the second Defendant.

Secondly it is for a declaration that the Plaintiff's property was illegally and fraudulently sold to the second Defendant, an order of cancellation of the second Defendant's title and reinstatement of the Plaintiff as the registered proprietor thereof.

Thirdly and in the alternative the suit is for an order directing the first Defendant to pay to the Plaintiff the current market value of the suit property at the time of judgment, an order of vacant possession and return of the suit certificate of title, aggravated damages, general damages and costs of the suit.

The cause of action for breach of the terms of the mortgage agreement is caught by the law of limitation.

The third cause of action cannot be maintained because it seeks in the alternative the market value of the property. Seeking the market value of the property flows from the premises that the property was sold at a rate below the market value. Actions for compensation are to be brought within six years under section 178 of the Registration of Titles Act. In the premises the Plaintiff's action for breach of the mortgage agreement or in the alternative for the market value of the property which in effect against the claim for compensation or deprivation as a consequence of fraud or any other cause of action is barred under section 3 (1) of the Limitation Act cap 80 as well as section 178 of the Registration of Titles Act having been brought more than six years from the date the cause of action arose.

The second cause of action for declaration that the Plaintiff's property was illegally and fraudulently sold to the second Defendant with the consequential relief being sought being the cancellation of the second Defendant's title and reinstatement of the Plaintiff is not time barred. The question as to whether the Plaintiff's cause of action can only be found on contract is a question on the merits as the issue of fraud may or may not be maintained against the First Defendant who is not the registered proprietor and will not be considered as a preliminary point of law. Unlike the case of **Western Highland Creameries Ltd and Another vs. Stanbic Bank Uganda Ltd and another** where the transferee in title was not a party or the Defendant, in this

case the second Defendant is the transferee in title and has been sued for cancellation of that title. The inclusion of the first Defendant on the cause of action to recover land cannot be concluded on the basis of the law of limitation since the cause of action is that for the recovery of land and fraud is alleged against both parties. The fraud alleged there under has a limitation period of 12 years. It is alleged that both of the Defendants fraudulently dealt with the property so as to have it transferred to the second Defendant.

This suit for cancellation of title is not barred by the law of limitation and survives against both Defendants. Why does it survive against the first Defendant bank? I rely on the case of **Kampala Bottlers Ltd v Damanico (U) Ltd** ((Civil Appeal No. 22 of 1992)) [1993] UGSC 1 and the judgment of PLATT, J. S. C where he held that the officials of Lands alleged to have participated in the fraud ought to have been joined to the action. Though there was no question of limitation, it is a question of the right to be heard before someone is alleged to have participated in fraud and the same is proved against another person as well. Platt J. S. C. Held:

In the first place, I strongly deprecate the manner in which the Respondent alleged fraud in his written statement of defence. Fraud is very serious allegation to make; and it is; as always, wise to abide by the Civil Procedure Rules Order VI Rule 2 (revised rule 3) and plead fraud properly giving particulars of the fraud alleged. Had that been done, and the Appellant had been implicated, then on the Judge's findings that would have been the end of the defence. If, on the other hand, the officials had been implicated, then on the usual interpretation of Section 184 (c) of the Registration of Titles Act, (Revised 176 (c) of the Registration of Titles Act cap 230) that would have been found to be insufficient. It is generally held that fraud must reside in the transferee. Whether the learned Judge's wider interpretation of the words of Section 184 (c) — "..... *as against the person registered as proprietor of such land through fraud"

can mean that the fraud of third parties quite apart from the transferee, is sufficient to set aside registered title, is a matter which may possibly need further elucidation. But it is not open for consideration in this case, because of another important procedural lapse. Had that been the Respondent's Case, he should have brought the Land Office officials and Town Council Officials before the Court. It is important that before someone's reputation is besmirched, he has had an opportunity to defend himself. The officials here might have explained the confusion in their action. Even incompetence might not be fraudulent. It must be understood from the nature of the defence, that the unspecified fraud must be primarily directed against the party in the case, against whom the defence has been made. That is to say, that primarily, the Respondent's allegation of fraud must relate to the way in which the Appellant gained registration, as the Appellant was the only other party in the case*. The resultant situation then is that as no fraud was found on the part of the Appellant, that was the end of the matter." (Emphasis added in italics)

The first Defendant is in the very least a necessary party to the action. Before the reputation of officials of the bank or the First Defendant bank, to use the words of Justice Platt, *is besmirched*, they should be afforded an opportunity to defend themselves even if the cause of action survives against the second Defendant only. The alleged fraudulent acts have been pleaded

in an action for recovery of land against the second Defendant and the first Defendant bank who acted as a Mortgagee that sold the property ought to be heard in defence of the allegation and for that reason they suit cannot survive against the second Defendant only but also against the first Defendant.

The resolution of any points of law to resolve the issue of whether a suit for recovery of land can be maintained against the first Defendant is stayed until after evidence is adduced by either side. This is to afford the first Defendant an opportunity to respond to any issue of damage to reputation in the action to recover land.

The preliminary objection therefore succeeds in part only in relations to allegations related to breach of contract as held above. The cause of action for cancellation of title shall be tried as pleaded against both Defendants without prejudice to any defence of the first Defendant on points of law and will not be disposed off preliminarily. The preliminary objection on the causes of action for breach of contract and for the alleged illegality of execution of mortgage or want of execution of mortgage in the prescribed form under the repealed section 115 of the Registration of Titles Act Cap 230 and the Eleventh Schedule thereof is sustained with costs.

Ruling delivered in open court at Kampala on the 10th of June 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Ogwang Sam for the Plaintiff

Plaintiff is absent

Namara Anne for the First Defendant

First Defendants representative is absent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

10th of June 2016

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