

UGANDA / JUDGMENT

Nantenge v Tropical Bank Limited (Civil Suit 483 of 2017) [2025] UGCommC 31 (18 February 2025) [2025] UGCommC 31

COURT

Commercial Court of Uganda

BEFORE

Ocaya, J

CASE / FILE NUMBER

Civil Suit 483 of 2017

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**5 THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION] CIVIL SUIT NO. 483 OF 2017**

10 NANTENGE CATHERINE] PLAINTIFF

VERSUS

TROPICAL BANK LIMITED] DEFENDANT

Before: Hon. Justice Ocaya Thomas O. R

JUDGMENT

Introduction:

The Plaintiff has initiated this suit against the Defendant, alleging misrepresentation, 20 trespass to land, wrongful interference with business, breach of trust, breach of contract, fraud, and unlawful interference with business.

The Plaintiff asserts that she is married to Ssendisa Makanga Patrick and that they jointly own matrimonial properties located at Block 254 Plot 846 and Block 254 Plot 766 and 767, 25 which include their matrimonial home and other income-generating buildings.

On June 12, 2017, unauthorized individuals entered these properties without her consent and attempted to evict both the Plaintiff and the tenants. They claimed to have been sent by the Defendant to carry out the eviction because her husband had defaulted on loan facilities

30 granted by the Defendant.

Again, on June 23, 2017, another group identifying itself as "Doctrines of Equity Agencies" visited the properties and served eviction notices on both the Plaintiff and the tenants. As a result, the tenants terminated their leases with the Plaintiff.

5 The Plaintiff maintains that she never consented to the mortgaging of Block 254 Plot 767, Plot 766, and Plot 846—properties where she resides and from which she derives income to serve as collateral for the Defendant's loan facility.

The Plaintiff has detailed her allegations of fraud/misrepresentation, illegality, and breach

- 10 of trust and contract as follows:
- (a) Issuing an eviction notice to the Plaintiff.
- (b) Issuing eviction notices to the tenants.
- (c) Attempting to evict both the Plaintiff and the tenants from the suit premises.
- (d) Attempting to sell the suit premises without a duly executed mortgage deed.
- 15 (e) Carrying out actions (a), (b), and (c) without first providing all legally required notices.
- (f) Implementing actions (a), (b), and (c) without securing a valuation appraisal of the suit premises that is current (i.e., not older than six months).
- (g) Attempting to sell the suit premises without obtaining a current valuation appraisal 20 (i.e., one conducted within the last six months).

The Defendant, in turn, contends that the Plaintiff executed a Statutory Declaration authorizing the registered proprietor/loan defaulter, Patrick Sendiisa, to mortgage the suit properties to the Defendant Bank. Moreover, a mortgage deed was duly executed with the 25 registered proprietor/loan defaulter in respect of the suit properties, and the Defendant's actions were lawful in so far as they were intended to recover the loan sums that the loan defaulter deliberately refused to repay. The Defendant further contends that the requisite Statutory Notices had been issued to the Mortgagor/Loan Defaulter.

30 The Plaintiff filed a reply to the Written Statement of Defense and contended that the credit facilities of UGX. 60,000,000/=, UGX. 70,000,000/= and UGX. 150,000,000/= were settled by the said Patrick Ssendiisa. Further that in March 2016 the Defendant recalled the loans it had granted the said Patrick Ssendiisa and purported to give notice of default and sale of the suit land.

- 5 That Defendant communicated that it would accept a payment of UGX. 9,673,966/= as penalty interest, UGX. 74,270,988/= as the outstanding on the Principal, and UGX 80,220,599/= as interest outstanding to which the Defendant Bank proceeded to deduct the above said sums of money from the account of Patrick Ssendiisa on the 27th of April, 2016.

- 10 The Plaintiff asserts that the notice issued to Patrick Ssendiisa by the Defendant was an afterthought and is in respect to UGX. 356,146,511/= for which there is no mortgage agreement or duly executed Statutory Declaration and the notices were issued after the suit had been filed and interim order issued against the Defendant restraining them from further dealings and or transacting the suit properties.
- 15

Further that Plaintiff contends that she did not receive any independent legal advice as to the implications and her rights pertinent to any and all of the transactions between the Defendant and Patrick Ssendiisa.

20 Representation:

The Plaintiff was represented by M/s Sebbowa & Co. Advocates and the Defendant was represented by M/s Kabayiza, Kavuma, Mugerwa & Ali Advocates.

Issues:

- 25 The following issues were arrived at for resolution.
- (1) Whether the Defendant was entitled to put up for sale the suit property?
- (2) Whether the Defendant was entitled to demand for vacant possession of the suit property?
- (3) Whether the Defendant is liable for wrongful interference with the trade and or
- 30 business of the Plaintiff?
- (4) Whether the Defendant is liable for Trespass?
- (5) What are the available remedies?

Evidence:

35 The Plaintiff adduced two witnesses, herself as [PW1] and Mr. Patrick Ssendiisa Makanga [PW 2] who both led their evidence in chief by way of witness statements which were

- 5 admitted in court record PW1 and PW2 respectively and were cross-examined on the same. The Plaintiff exhibited Seven documents, namely a copy of a marriage certificate (PEX1), a Notice of sale dated 3rd March 2016 (PEX2), Certified copy of Bank Statements in the name of Ssendiisa Makanga Patrick dated 1st June 2015 -20th June 2017 (PEX3), a Notice of eviction dated 23rd June 2017 (PEX 4), a Notice of termination of tenancy dated 23rd June 2017(PEX

- 5), a Notice of default and recall of loan dated 3rd 10 July 2017(PEX 6) and Copies of Tenancy Agreements of the Tenants (PEX 7 (1) -(5)).

The Defendant adduced one Witness, Mr. Asuman Bamweyana [DW1], the Assistant Manager of Legal Department in the Defendant Bank and led his evidence in chief by way of Witness 15 Statement which was admitted in court and was cross-examined on the same. The Defendant filed a trial bundle on the court record and exhibited 13 documents, namely a Statutory Declaration dated 17/12/2014 (DEX 1), a Statutory Declaration dated 9/5/2014(DEX 2), a Mortgage Deed dated 15/1/2015(DEX 3), a copy of a credit facility agreement dated 2/5/2014 (DEX 4), a copy of a credit facility agreement dated 23/7/2014(DEX 5), a copy of

- 20 a credit facility agreement dated 18/12/2014(DEX 6), a copy of a letter by a Mortgagor requesting for a restructuring of the loan(DEX 7), a copy of a letter by the Defendant Bank accepting to restructure the loan (DEX 8), a Copy of Bank Statement in the names of the Mortgagor(DEX 9), a Notice of Default dated 10/12/2015(DEX 10), a Notice of Sale of Mortgaged Property dated 3/03/2016(DEX 11), a Demand Notice dated 20/10/2015(DEX 12), and Letters of undertaking by the Mortgagor's Lawyer dated 26/10/2015(DEX 13).

Decision:

I will resolve issue 1 on Whether the Defendant was entitled to put up for sale the suit property and Issue 2 on Whether the Defendant was entitled to demand for vacant 30 possession of the suit property Jointly. This is because the right of sale is related with the right of foreclosure/vacant possession of the property which would enable the new purchaser to take over possession from the persons in occupation of the suit land.

In Civil proceedings, the burden of proof lies upon he who alleges and must prove his case on a balance of probabilities if he is to obtain the remedies sought. When a Plaintiff has led evidence establishing his or her claim, he/she is said to have executed the legal burden. The evidential burden thus shifts to the Defendant to rebut the Plaintiff's claims. The legal burden of proof does not, however, shift. see *Lord Denning in Miller versus Minister of Pensions (1947)2 ALL ER 372 on page 373*, *Section 101 and Section 103 of the Evidence Act*

PW 1 in her evidence in chief Paragraphs 3-6 and 8 stated that the suit properties are her matrimonial property although it is solely registered in PW 2's name and that the Defendant never wrote to her giving her notice of default by PW 2 Ssendiisa Makanga Peter neither did the Defendant give her a notice of sale of the suit property.

Further that the Defendant did not cause the suit property to be appraised and valued. PW 2 in his evidence-in-chief testified that no notice of sale of the suit property was served on the Plaintiff.

- 15 Counsel for the Plaintiff submitted that under Section 19 of the Mortgage Act, a notice in writing of the default requiring the mortgagor to rectify the default within 40 working days and that under subsection (d) that failure to rectify the default within the specified time in the notice, the mortgagee will proceed to exercise any of the remedies referred to section 20.
- 20 Counsel further cited section 26 of the same act that prior to exercising the power of sale, the mortgagee shall serve a notice to sell in the prescribed form on the mortgagor and a copy shall be served on any spouse or spouses of the Mortgagor.

Counsel further submitted that the issuance of these notices is mandatory under sec 27 and 25 39 of the Mortgage Act and also, Regulation 8(4)(5) of the Mortgage Regulations 2012. Counsel further submitted that it was the Plaintiff's evidence that the Defendant bank did not cause the suit property to be valued in the six months leading up to when the suit property was put up for sale, that is between December 2016 and July 2017.

30 Furthermore, the Plaintiff was neither cross-examined on the above material nor did the defense tender in evidence of a valuation report to the suit property made six months prior to it.

5 Counsel cited **Uganda Revenue Authority v Stephen Mabosi SCCA 1995** *at page 5 Karokora J. S. C (as he then was)* held that:

"It has been held by this court in Criminal Appeal No. 5/1990, James Sawoabiri & Fred Musisi v Uganda(unreported) that an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination would lead to the inference 10 that the evidence is accepted"

Counsel also submitted that the loan facility was restructured and that meant that in case of any default after the restructuring the Defendant has to issue a fresh default notice and notice of sale to the defaulting mortgagor and in the case of the notice of sale to the Plaintiff which 15 was not done.

The Defense led evidence to the effect that on the 27th day of April 2016 a new loan of UGX. 356,146,511/= was credited to the mortgagor's bank account. Whereas the mortgagor stated that he never authorized the use of the suit properties as security for the payment of UGX.

20 356,146,511/=, part of which he used to clear the loans that were secured by the suit properties. That therefore the UGX. 356,146,511/= was unsecured and the same was collaborated by the testimony of the defense witness.

Further the Defendant's evidence showed that the Bank agreed to mortgage the suit property 25 (Plot 846 and Plot 766) with the mortgagor vide clause 9(a) of the credit agreement on the 23rd July, 2014. That the alleged spousal consent to the mortgaging of the above suit property relied on by the Defendant, the Statutory Declaration is dated 17th December 2014. Therefore, there was no prior spousal consent.

30 The Defendant relied on in the evidence of DW 1 Asuman Bamweyana who testified that the spousal consent was sought and obtained from the Plaintiff and this is apparent from Exhibit D5 and Exhibit D6 which are Statutory Declarations. Counsel went on to reproduce extracts from the Statutory Declaration.

5 Further, that exhibit D6 is a spousal consent for properties comprised in Block 254 Plots 846 and 766 and Exhibit D5 is in respect of Block 254 Plot 767. That for all intents and purposes, the requisite spousal consent was sought and obtained by the Defendant.

Further that it is important to note that the mortgage deed exhibit D3 which canvases the properties comprised in Block 254 Plots 766 and 767 is dated 15th 10 January 2015 and the spousal consents are dated 9th May, 2014, and 17th December, 2014.

That there was sufficient spousal consent for the loan sums of UGX 60,000,000/=, UGX 70,000,000/=, and UGX 150,000,000/=.

DW 1 in paragraph 8 of the witness statement stated that the Plaintiff swore that she is married to the loan defaulter, and that she assents to him mortgaging the property to Defendant for a loan term of UGX 150,000,000/=. That she waived her right to seek independent advice on the terms and conditions of the mortgage applied for and therefore 20 accepted to be bound by them.

Counsel further argued that the Plaintiff is dishonest and the argument that she is illiterate and gave consent contrary to section 3 of the Illiterates Protection Act is an afterthought and it was not pleaded in her plaint nor was it pleaded in her application for an Interim Order

- 25 and the Application for an injunction in D15 and D16 which amounts to a departure from pleadings under Order 6 rule 7 of the Civil Procedure Rules. Counsel cited *Struggle Ltd V Pan African Insurance Co. Ltd* (1990) ALR 46-47 on parties being bound by their pleadings and not allowed to depart from them.
- 30 Further that the Plaintiff in her Affidavits in support of the Application for an injunction Miscellaneous Application No. 673 of 2017 D17 and Application for an Interim Order Miscellaneous Application No. 672 of 2017 there are no Certificate of Illiteracy and in cross examination she could not explain the inconsistency.
- 35 Further that the Plaintiff did not raise the issue of her being illiterate, disputing the issue of the spousal consent although she raised it in her plaint, raise the issue of the alleged

5 settlement of the loan, dispute the existence of a valid mortgage in respect of the suit property in her Evidence in chief.

The Plaintiff in submission in rejoinder reiterated the earlier submission.

10 As noted from the Plaintiff's submission and testimony, she raised severally issues with the legality of the mortgage and the foreclosure. The court will resolve each of the issues one at a time.

Spousal Consent

- 15 PW2 the Mortgagor, Patrick Makanga Sendiisa, the Plaintiff's husband had the power to create a mortgage under Section 3 of the Mortgage Act owing to the fact that he was the registered proprietor of the suit property, and subject to statutory limitations to that power, such as the obligation to obtain spousal consent where applicable. Mr. Sendiisa as mortgagor was under a duty to act honestly and in good faith and disclosing all relevant information
- 20 relating to the mortgage. See **Christine Kanyima v Mercantile Credit Bank HCMC 85/2021, Section 4 of the Mortgage Act.**

Section 40 of the Land Act and Section 5 of the Mortgage Act provide for spousal consent in the event the Mortgagor wants to mortgage a matrimonial property.

Section 40(1) and (2) provides thus:

"(1)

A person shall not—

- (a) sell, exchange, transfer, pledge, mortgage or lease any family land;
 - 30 (b) enter into any contract for the sale, exchange, transfer, pledge, mortgage or lease of any family land; or
 - (c) give away any family land inter vivos, or enter into any other transaction in respect of family land, except with the prior consent of his or her spouse.
- (2) The consent required under subsection (1) shall be in the manner prescribed by 35 regulations made under this Act.

5 Section 5 of the Mortgage Act provides thus:

"(1) Notwithstanding section 39 of the Land Act, a mortgage of a matrimonial home, including mortgage on customary land of a matrimonial home is valid if—

- (a) any document or form used in applying for the mortgage is signed by or there is evidence from the document that it has been assented to by the mortgagor and the spouse or spouses

10 of the mortgagor living in that matrimonial home;

- (b) any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgagor and the spouse or spouses of the mortgagor living in that matrimonial home.

- (2) For the purposes of sub section (1)—

- 15 (a) an intending mortgagee shall take reasonable steps to ascertain whether an intending mortgagor is married and whether or not the property to be mortgaged is a matrimonial home;
- (b) an intending mortgagor shall make full disclosure to the intending mortgagee as to his or her marital status and whether or not the property to be mortgaged comprises the 20 matrimonial home.
- (3) The mortgagee shall be deemed to have discharged the duty under subsection (2), if the mortgagee obtains a marriage certificate issued in accordance with the laws of Uganda, and in the absence of it, a statutory declaration from the spouse or spouses of the mortgagor as proof of marriage."

In the instant case, there is no dispute that the Plaintiff is married to the mortgagor. The Defendant adduced two spousal consents marked DEX1 and DEX2. DEX1 is a Statutory declaration dated 17 December 2014 signed by a one Catherine Nantege Ssendiisa providing spousal consent for the pledging of land described as Kyadondo Block 254 Plot 767 Land at

30 Kansanga and Nabuti as security for the advance of UGX 60,000,000 and DEX2 is a Statutory declaration by a one Catherine Nantege Ssendiisa dated 9th May 2014 providing consent for the mortgaging of Kyadondo Block 254 Plots 846 and 766 at Kansanga and Nabuti as security for the provision of a term loan of UGX 150,000,000.

- 5 Section 3 of the Illiterates Protection Act provides for the verification of documents written by illiterates. The purpose of such verification is to confirm that the contents of such documents has been made aware to the illiterate signatory before the said signatory appended their signature. In **Stanbic Bank Uganda Limited v Moses Senyonjo & Anor CACA 147/2012** the court held thus;
- 10 "The expression "illiterate" does not mean unable to understand English language but it means unable to read and write in that language.... Secondly, the word "illiterate" clearly does not connote or mean "unable to understand the English language as such" but means unable to understand the script or language in which the document is written or printed. It has everything to do with understanding the written 15 language...Being literate in another language other than that of the script does not qualify a person to be literate in the language of the questioned script. In this particular case, the appellants were illiterate in the English language and were therefore unable to write or read in the English language."
- 20 The question that follows from the foregoing is whether the Plaintiff could read and write in English, being the language in which the impugned documents were written. The Defendant contended that the actions of the Plaintiff in so far as she contended not to understand English were afterthoughts. The Plaintiff's testimony was that she could not comprehend English and accordingly, the said spousal consents were invalid. The court takes note of the

- 25 fact that in HCMA 674/2017 and HCM3 674 of 2017 being applications for an Interim injunction and Temporary Injunction respectively and arising from the present cause, the Plaintiff, as applicant gave evidence by way of affidavit on oath on several instances and none of those affidavits carried a certificate of translation.
- 30 A review of the plaint shows that the Plaintiff does not allude to illiteracy at all. Her case, as presented in the plaint on record is simply that the said property is the subject of an illegal mortgage by the Defendant as no such mortgage was ever revealed to the Plaintiff. Subsequently, the Plaintiff now contends that the said consents were invalid because they were not attested as she is illiterate.
- 5 First, a party is bound by their pleadings. A party cannot plead two inconsistent contentions at ago. In my considered view, first and foremost, the consents must either exist or not exist. If a party contends that no spousal consent was ever issued since the mortgage was executed without her knowledge, she cannot, in the same breath say that the same spousal consent is invalid as the same does not comply with the provisions of the Illiterates Protection Act. In
- 10 my considered view, a party must either acknowledge the existence of such consent albeit challenging its validity or must be consistent in their averment that such consent was never given in the first place as there was no knowledge of the mortgage. See **Bank of Baroda (Uganda) v Aparna Shukla HCMA 1379/2024, Kumaraswami Gounder and Ors. vs D. R. Nanjappa Gounder & Ors AIR 1978 Madras 285 FB**
- 15

Section 2 of the Evidence Act provides thus

""evidence" denotes the means by which any alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved and includes statements by accused persons, admissions, judicial notice, presumptions of law, and ocular 20 observation by the court in its judicial capacity;"

Court is empowered to form an impression of a witness and use its observations as part of the evidence in determining a dispute. The court will observe the character and demeanor of a witness, their conduct before it (such as whether a witness is uncertain or compelling, 25 evasive or the contrary etc) and use the same to form an impression of the witness and their evidence. See **Uganda v O. R HCCC 21/2019**

The court's impression of the Plaintiff was that she was being dishonest as to the existence of the spousal consents and it was more probable than not that she executed the same and

30 with the proper understanding of the contents therein. In the court's impression, the Plaintiff's insistence that she did not speak English was, on the whole of the evidence, belated and an attempt to unduly cast doubt on the validity of the said consents which were otherwise properly executed by her prior to the creation of the mortgage and the disbursement of the loaned sums.

5 Extent of Mortgage/Consents

The Plaintiff contended that there was no spousal consent and therefore no lawful mortgage over land described as Block 254 Plot 767. I notice that the notice of default adduced by the Plaintiff and annexed to her reply to the written statement of defence reflects three properties to wit Kyadondo Block 254 Plot 766, 767 and 846. Interesting to note is that the

- 10 notice of sale attached to the Plaintiff and dated 3 March 2016 references Kyadondo Block 254 and only plots 766 and 767. I have not been presented with evidence that shows that Plot 846 was mortgaged, or that it was subdivided from (and perhaps later re-consolidated) with the any of the mortgaged plots.
- 15 A mortgage is security for the repayment of a debt. The property under a mortgage is pledged only as security for the repayment of the loan and the mortgagor is entitled to redeem the property given as security once the loan it secured is repaid. Once there is a default on the loan, the mortgagee is entitled to take advantage of all the statutory reliefs available to a mortgagee on a mortgagor's default. It follows from the foregoing that for a person to seek to
- 20 exercise any reliefs of a mortgagor, whether with or without recourse to court, such a person must first hold a valid mortgage pledging each of the properties they seek recourse against as security for the repayment of a debt. Without a valid mortgage, a party cannot exercise the reliefs of a mortgagor. It is not enough that the parties executed a loan agreement, it must be shown that each property in respect of which the mortgagee seeks to exercise their rights,
- 25 there is a valid mortgage conferring on the mortgagee (whether by itself or together with the law) the rights to take the actions of recourse. Therefore, a mortgagee's right of recourse cannot exist without a valid mortgage. See **Luwa Luwa Investments v URA HCCA 43/2022**, **Fredrick Zaabwe v Orient Bank & Ors SCCA 4/2006**, **Tropical Bank v Grace Were SCCA 4/2011**

This principle, was more succinctly put by the Supreme Court in **Fred Kamanda v UCB SCCA 17/1995** in which Justice Oder *(RIP)* held;

"A valid pledge had to precede a lawful seizure."

5 Whereas the Supreme Court was in this regard speaking about movable securities, in my view the dicta applies to immovable securities such as this one. Sale is a sort of seizure in the sense that the mortgagee has shifted from his position as a pledgee.

As noted above, a mortgage is a pledge of property on condition that in the event of default, 10 the mortgagee may sell the property to recover the sums owed. It therefore clothes the mortgagee with powers of sale, and when such mortgagee elects to exercise them and sell, they have more or less seized the property in the sense that they are entitled to receive possession and hand it over to the purchaser. It is true that the mortgagee may obtain possession prior and it is also true that the mortgagee may sell without possession and seek 15 possession subsequently by filing an application or cause for the same in the court. That does not change the fact that in the event of default, unless the mortgagor does not seek to enforce

such right, they are entitled to possession.

This is first to enable the mortgagor conduct the sale process, such as by bringing buyers to 20 property. A Mortgagor who prevents possession wrongfully then must be taken to suffer the risks of such an action, the major one of which is that the property may fetch a lower value in the market because, for instance, inspection or valuation has been frustrated or prevented. Nonetheless, the position of the law is that a valid mortgage must come before a valid sale.

- 25 In the present case, while Kyadondo Block 254 Plot 846 is mentioned in the Credit facility agreement dated May 2nd 2014 (DEX 4) and Credit facility agreement dated July 23rd 2014 (DEX 5). I do not see a valid mortgage for Kyadondo Block 254 Plot 846 and I agree with Counsel that there can be no exercise of any the rights of the mortgagor in respect of that property. However, there is a valid mortgage in respect of for Kyadondo Block 254 Plot 766
- 30 and 767.

Restructuring

The Plaintiff's contended that the said facility UGX. 356,146,511 was unsecured due to the effect of restructuring of the Mortgagor's loan facility by the Defendant.

5 Restructuring refers to the alteration or variation of the terms of the loan facility to avoid default because of difficulties exercised by the borrower or mortgagor to ably service the loan facility.

Section 12 of the Mortgage Act provides thus;

10 "12. Variation of a mortgage

- (1) The rate of interest payable under a mortgage may be reduced or increased by a notice served on the mortgagor by the mortgagee which shall—
 - (a) give the mortgagor not less than fifteen working days' written notice of the reduction or increase in the rate of interest;

15 (b) state clearly and in a manner which can be readily understood, the new rate of interest to be paid in respect of the mortgage;

- (c) state the responsibility of the mortgagor to take such action as he or she is advised by the notice to take to ensure that the new interest rate is paid to the mortgagee.
- 20 (2) The amount secured by a mortgage may be reduced or increased by a memorandum which—
 - (a) complies with subsection (5); and
 - (b) is signed—
 - (i) in the case of a memorandum of reduction, by the mortgagee; or
 - 25 (ii) in the case of a memorandum of increase, by the current mortgagor; and
- (c) states that the principal moneys intended to be secured by the mortgage are reduced or increased as the case may be, to the amount or in the manner specified in the memorandum.
- (3) The term or currency of a mortgage may be shortened, extended or renewed by a memorandum which—

30 (a) complies with subsection (5);

- (b) is signed by the current mortgagor and by the mortgagee; and
- (c) states that the term or currency of the mortgage is shortened, extended or renewed, as the case may be, to the date or in the manner specified in the memorandum.
- 5 (4) The covenants, conditions and powers expressed or implied in a mortgage may be varied, but not so as to impose any significantly greater burdens on the borrower than those set out in section 17 by a memorandum which—
 - (a) complies with subsection (5);
 - (b) is signed by the current mortgagor and the mortgagee; and
- 10 (c) states that the covenants, conditions and powers expressed or implied in the mortgage are varied in the manner specified in the memorandum.
- (5) A memorandum for the purposes of subsections (2), (3) and (4)—
 - (a) shall be endorsed on or annexed to the mortgage instrument; and
 - (b) when so endorsed or annexed to the mortgage instrument, operates to vary the mortgage
- 15 in accordance with the terms of the memorandum."

Section 66 of the Contracts Act provides thus:

"Where any right, duty, or liability would rise under agreement or contract, it may be varied by the express agreement or by the course of dealing between the parties or

20 by usage or custom if the usage or custom would bind both parties to the contract."

See Mogas (U) Ltd v Benzina (U) Ltd HCCS 88/2013

In **TMA Architects & Anor v Prime Solutions Limited HCMC 80/2021** interpreted Section 66 (then Section 67 above) holding as below:

25 "In simple terms, a contract variation occurs when the parties agree to do something differently from the way they originally agreed, whilst the remainder of the contract otherwise operates unchanged. A valid variation usually has four key elements; (i) the parties must usually mutually agree to alter or modify the contract. In some circumstances the underlying contract might give one party a unilateral right to make 30 certain limited changes, but agreement is normally necessary (ii) the parties must intend the alteration/modification permanently to affect their rights. If there is no such intention, then the change is likely to amount only to a temporary forbearance or concession, rather than a permanent variation of the contract; (iii) the parties must comply with any requirements as to the form of the variation. These could be specified 35 by legislation, or set out in the original contract which is being varied. Where the law

- 5 prescribes that certain types of contracts must be in writing, variations to those contracts must also therefore be in writing; and (iv) the agreement to vary a contract will need to be supported by consideration - something of value must be given in exchange for the alteration. If there is no such consideration, then the variation will need to be effected by deed."
- 10

A restructuring of a loan is essentially a variation of a contract. In that regard, where the restructure is achieved by modifying some of the terms of the facility, only those terms will be deemed amended and the rest of the terms will apply without modification. In those circumstances.

DEX 7 is a handwritten letter dated 18th March 2016 addressed to the Head Credit/Mortgage Manager of Tropical Bank in brackets Mr. Kiwewa and signed off by Hon. Ssendiisa Maganaga Patrick with the heading "Restructuring of my Mortgage Rate".

- 20 The body in part reads that "I humbly wish to request you in regard to the above-mentioned subject matter, that you restructure my mortgage rate which is at a percentage of 34% back to preferably 20% - 22% on grounds that am a continuous performer as clearly stated by my bank statement*".

- 25 DEX 8 is a letter addressed to Ssendisa Makanga Patrick from Tropical Bank and signed off by Edward Kiweewa, Senior Manager Credit Control and Recovery headed "Request to Restructure Commercial Loan IRO A/C 10060516".

The in part reads that "With reference to the above-mentioned subject, we are pleased to

30 inform you of our agreement to restructure your term of loan subject to the following terms and conditions-

Amount: UGX 356,146,511.49

Duration: 60 months.

Purpose: To enable the customer to pay off the debt facility with the lender.

35 Repayment: in sixty equal installments of UGX 10,245,611 by debiting transactional account.

Interest rate: Interest rate is 24% per annum.

5 Securities: Secured.

Restructuring Fees: 1% flat on the restructured amount. Other terms and conditions of the loan agreement remain unchanged.

During cross-examination PW 2, during cross examination stated the he paid all the money 10 owed to the bank on the 27th of April, 2016. PEX 3 and EX 9 of the Plaintiff's and Defendant's trial bundle respectively is the Certified Bank Statement of Ssendisa Makanga Patrick from the date of 01 January 2015 to 20th June 2017.

On the date on the date of 27th April 2016 in the credit column is the amount of UGX 356, 15 511.00 upon being asked in cross-examination to read the words in the Description section, PW 2 stated that it reads "New loan Placement".

It is common ground that there was another loan facility granted to PW 2 on the 27th of April, 2016 the purpose for which per PW 2's testimony and that evidence by DEX 8 the loan 20 restructuring letter is to offset the previous loan facility and by the fact that PW 2 agreed to restructure with the conditions therein including that the previous terms and conditions of the earlier loan agreement stands is in effect that the securities therein are carried forward to the restructured loan.

- 25 Section 39(3) of the Land Act provides for the requirement that a spouse shall consent to a pledge of family land provided for under Section 40 of the Act. Section 39(3) provides that the consent is required for the "transaction". The question that then arises is whether a restructure of a loan creates a new "transaction". In my view, a "transaction" must be one that creates a charge. Important to note is that the spousal consent is relevant for the mortgage,

- 30 and not for the loan agreement. It is the mortgage that creates a charge and not the loan agreement, since a party can take out an unsecured loan without their spouse's consent. In the present case, there was no variation of the mortgage and therefore, at the point of enforcement, the mortgage transaction which the Plaintiff consent to had not changed. An amendment of the terms of the transaction creating a charge cannot create a requirement for

5 a new spousal consent. In any case, the spousal consents adduced by the Defendant were couched broadly, permitting modifications of the terms of the agreement.

Counsel for the Plaintiff cited the Supreme Court decision in **General Parts(U) Limited and Another V Non-Performing Trust SCCA 09 of 2005** in support of the proposition that there 10 was requirement for a fresh consent. The decision of the learned justices of the Supreme Court in effect did not mean that restructuring a loan has the effect to compromise any and all prior defaults which would in this instant case mean that the mortgagor/Plaintiff's husband ceased to be in default.

15 **Mulenga JSC** in his lead Judgement on the issue of the imperfection of the Powers of Attorney and its intended purpose of securing a fresh loan, but not for securing the existing overdraft that was already secured by a debenture. He stated-

"The only rational way to construe the stipulation that those powers would be irrevocable before payment of money borrowed there under must be in the context of the* 20 *agreement to restructure the overdraft into two loans and reschedule the repayment thereof. The restructured loan in that context is deemed to have been "borrowed" under those powers. The fact that after realizing that the request for further funding was rejected, the 2nd appellant did not attempt to withdraw or revoke the powers he had granted, fortifies me in that view. It also gives me the impression that the claim that the* 25 *powers were granted in respect of a fresh loan is an afterthought designed to avoid liability.*" Emphasis is mine.

Therefore, it follows that the a restructure of the mortgage does not, by itself alone, create the requirement for a fresh spousal consent. In the circumstances, this court finds that the

30 Plaintiff consented to the use of the properties listed in the two Statutory Declarations as security for loan.

Procedural Irregularities in Foreclosure

The Plaintiff alleges procedural defects in the foreclosure process undertaken by the 35 Defendant.

5 Section 20(e) of the Mortgage Act provides for a remedy to sell the mortgaged land by the mortgagee. The mortgagee may give a notice of default as provided under Section 19 of the Mortgage Act. There is no default until the mortgagor has been given a notice of default.

Section 19 (4) provides that a mortgagor is deemed to be in default warranting the service 10 of a notice in writing if he fails to pay within 30 days from the date when the obligation to pay becomes due. The letter of loan restructure in DEX 8 provides for a duration of 60 days which starts running from the date 27th of April, 2016 being the date the restructured loan was disbursed, and expires on the 28th of June, 2016.

- 15 Defendant adduced DEX 10 which is the Notice of Default which was served on Patrick Ssendiisa who does not dispute receipt of the same having acknowledged receipt on the 10th December, 2015. The period in between when the loan duration expires and the notice was serviced exceeds the 30 days.
- 20 Section 19(2) provides for service of demand notice requiring the mortgagor to rectify the default within 45 working days. The Defendant adduced DEX 13 which is a demand notice dated 20th October 2015 which was served on the Mortgagor as evidenced by the reply through his lawyer's M/S Mulira and Company Advocates dated 26th October 2015 offering to pay UGX 5,000,000/= per month starting from 25th November 2015 due to the fact that his

25 buildings for which he obtained the loan facility for its construction was not fully occupied.

Plaintiff adduced PEX 2 which is a notice of sale of the mortgaged property under section 26 of the Mortgage Act served on M/S Mulira and Company Advocates which stated that the Mortgagor shall after 21 working days from the date of receipt which was 4th of March, 2014

30 sell the mortgaged.

During cross-examination the Plaintiff stated that she does not know Mr. Peter Mulira, whom I presume is a lawyer in M/S Mulira and Company Advocates who acted for the Mortgagor in the matter of the correspondences stated herein. This in effect makes it unlikely to impart

35 knowledge of the notice to sale by the Plaintiff.

- 5 Section 26(3) of the Mortgage Act provides that- A copy of the notice to sell served in accordance with subsection (2) shall be served on—
- (a) a mortgagor;
- (b) any spouse or spouses of the mortgagor in respect of a matrimonial home;
- 10 The Defendant did not adduce any further evidence to show that M/s Mulira & Co. Advocates were the Plaintiff's advocates and agents. Additionally, no other evidence was adduced showing that the Plaintiff being served with the notice of sale as mandated by section 26(3) b with the knowledge that there was matrimonial consent vide DEX 1 and DEX 2 further with the knowledge that the loan restructuring letter maintains the terms and conditions in the
- 15 original mortgage deed; the Defendant ought to have endeavored to serve the Plaintiff personally or in failure of that by a substituted service which did not happen in this case.

In the circumstances, I find that the Defendant whereas was entitled to exercise its right of sale but was not entitled to sell the mortgaged properties comprised on Plots 766 and 767 20 Block 254 Kyadondo-Kansanga as addressed in the sale notice having failed to follow the law on-sell of the Mortgaged property.

Issue 3 and 4: Whether the Defendant is liable for wrongful interference with the trade and or business of the Plaintiff? And whether the Defendant is liable for Trespass.

25 I will resolve the two issues jointly because it concerns the question of whether the Defendant had a legal justification for its agents to come onto the property to serve the notices.

At common law, a defendant's [intentional interference with contractual relations](https://www.law.cornell.edu/wex/intentional_interference_with_contractual_relations) means that 30 they procured a breach of contract or prevented the performance of a contract. In an intentional interference claim, the burden is on the Plaintiff to prove the [elements](<https://www.law.cornell.edu/wex/element>) of the claim rather than on the Defendant to prove that its acts were justified. According to the case of [United Truck Leasing Corp. v.](<https://casetext.com/case/united-truck-leasing-corp-v-geltman>) *Geltman*, 551 NE 2d 20, 406 Mass. 811 - Mass: Supreme Judicial Court, 1990, the court held that for the claim of unlawful/wrongful interference to

35 prevail, the Plaintiff must prove four elements:

- 5 1. A valid [contract](<https://www.law.cornell.edu/wex/contract>) existed,
- 2. The Defendant had [knowledge](<https://www.law.cornell.edu/wex/knowledge>) of the contract,
- 3. The Defendant acted intentionally and improperly, and
- 4. The Plaintiff was [injured](<https://www.law.cornell.edu/wex/injury>) by the defendant's actions.

See Douglas v Hello! Ltd [2006] QB 125, Mainstream Properties Ltd v Young [2005] 10 IRLR 964

The impugned interference must be direct. Indirect interference is not actionable except if unlawful means are used. In my view, unlawful means must those specifically prohibited by law, rather than those which constitute statutory or regulatory non-compliance per se.

15 See Thomson (DC) & Co Ltd v Deakin [1952] Ch. 646, Morgan v Fry [1968] 2 QB 710

The Plaintiff in her evidence in chief stated that she had tenants in occupation of the suit properties from which she was gainful collecting rent and the same is corroborated by the contents of the letter in DEX 13. In Paragraph 4(g)-(o) of the Plaintiff, the Plaintiff contends

20 that on 12 June 2017 unknown persons came to the suit property and purported to evict the Plaintiff and her tenants. The Plaintiff pleads that she called local authorities who prevented the purported eviction. The Plaintiff further pleads that on 23 June 2017, another group of individuals came and issued the Plaintiff with notices of eviction. The Plaintiff contends that owing to the above, her tenants terminated their tenancies.

The Plaintiff adduced PEX 2 the notice of sale from the Defendant and PEX 4 notice of eviction from the Defendant's agents for vacation of the mortgaged properties. Plaintiff also adduced PEX 5 which is the termination letters from the tenants in occupation of the mortgaged properties terminating their tenancy due to fear of eviction from the Defendant's agents.

Counsel for the Plaintiff submitted that the above shows that the Plaintiff had contracts with third parties that the Defendant was aware of and Defendant yet went on to illegally issue vacation notices which prevented the tenants from performing their tenancy agreement leading to termination by the tenants and the Plaintiff incurred financial injuries.

5 The Defendant contended that the Plaintiff was aware of the loan's existence and that the purpose for the loan facility was to construct the said buildings on mortgaged properties and the alleged collections from the rentals were never used to settle the loan facility by Plaintiff who allegedly collected. That there was a default of the loan facility which culminated in the bank attempting to exercise its right of foreclosure as such the Plaintiff is coming to court

10 with dirty hands.

In *OBG Ltd v Allan* [2005] QB 762 the defendants were receivers purportedly appointed under a floating charge which is admitted to have been invalid. Acting in good faith, they took control of the claimant company's assets and undertaking. The claimant contended that this 15 was not only a trespass to its land and a conversion of its chattels but also the tort of unlawful interference with its contractual relations. The claimants also contended that the defendants are liable in damages for the value of the assets and undertaking, including the value of the contractual claims, as at the date of their appointment. Alternatively, the claimants asserted that the defendants are liable for the same damages in conversion.

Lord Hoffmann held that invalidly appointed receivers were not liable to the company for wrongful interference with contractual relations. Such a receiver acting in good faith employs no unlawful means and intends to cause no loss. Intangible property cannot be the subject of a claim for conversion. On the tort of inducing or procuring breach of contract, 25 there are five requirements: (1) there must be a contract (2) the contract must be breached (3) the defendant's conduct must have procured or induced the breach (4) the Defendant must have known about the breached term or turned a blind eye to it, and (5) the Defendant must have actually realized that the conduct procuring the breach would have that result.

30 It is not in dispute that there was a loan facility and the loan facility was used by the mortgagor to construct the rentals in question here. Whereas the loan facility agreement and the restructuring letter do not specify what avenues the facilities shall be serviced by, however, it did state that the mortgaged properties where the rentals are situated are securities.

- 5 Whereas it is common ground that a notice of eviction was served, there was unchallenged evidence that the persons acting on behalf of the respondent purported to evict the Plaintiff even without a valid notice of sale as already found above, and in the first instance, without a notice of sale. This court takes note of the long-standing principle that when parties charge property as security for a loan, they are in fact converting that property into a commodity
- 10 for sale available for purchase by all and sundry if the fail to pay the charge debts or loans and no sentimental or other value or attachment to the mortgaged property, however great, per se would operate against the exercise of a statutory power of sale by the mortgagee. See **Joseph Gitahi v Pioneer Holdings CACA 125/2008 (Kenya), Shimmers Plaza Limited v National Bank Of Kenya (2013) KECA 359.**
- 15

However, the Mortgage Act and regulations create a very clear procedure for sale of mortgaged property. Such power of sale cannot be exercised hawkishly. A sale by mortgagee is a unique power in the sense that it frustrates the right of redemption of a mortgagor. Additionally, it has the effect of affecting third parties, such as spouses. Accordingly, the 20 exercise of a power of sale must be in compliance with the sale procedure provided by law, which requires the provision of notices, including a notice of sale and a notice of eviction.

In the present case, in my considered view, I do not find that there was a wrongful interference of trade because the actions accused of have not been shown to directly cause 25 the said breaches of contract because;

- (a) It has not been shown that the said termination of the tenancies with the Plaintiff by the tenants was in breach of contract. It is trite law that a tenancy may be terminated with notice and the fact that a tenant terminated their contract is not, by itself alone, evidence that the contract was terminated wrongly.
- 30 (b) It has not been shown that the said actions were either calculated to cause the termination or were the result of negligence on the part of the defendant. It has not been shown that actions of the defendant's agents were unlawful, albeit that they could have been wrongful.

5 Trespass

In Justine E. M Lutaaya v Stirling v Stirling Civil Engineering Company Limited SCCA

11/2002 the Supreme Court addressed the question of trespass exhaustively holding thus:

"Trespass to land occurs when a person makes an unauthorized entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of 10 that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. Thus, the owner of an unencumbered land has such capacity to sue, but a landowner who grants a lease of his land, does not have the capacity to 15 sue, because he parts with possession of the land. During the subsistence of the lease, it is the lessee in possession, who has the capacity to sue in respect of trespass to that land. An exception is that where the trespass results in damage to the reversionary interest, the landowner would have the capacity to sue in respect of that damage. Where trespass is continuous, the person with the right to sue may, subject to the law 20 on limitation of actions, exercise the right immediately after the trespass commences, or any time during its continuance or after it has ended. Similarly, subject to the law on limitation of actions, a person who acquires a cause of action in respect of trespass to land, may prosecute that cause of action after parting with possession of the land. For purposes of the rule, however, possession does not mean physical occupation. The 25 slightest amount of possession suffices. In Wuta-Ofei v Danquah (1961) 3 All E. R.596, at p.600 the Privy Council ...put it thus - "Their Lordships do not consider that, in order to establish possession, it is necessary for the claimant to take some active step in relation to the land such as enclosing the land or cultivating it. The type of conduct which indicates possession must vary with the type of land. In the case of vacant and 30 unenclosed land which is not being cultivated, there is little which can be done on the land to indicate possession. Moreover, the possession which the respondent seeks to maintain is against the appellant who never had any title to the land. In these circumstances, the slightest amount of possession would be sufficient." In two leading authorities in East Africa, it was held that a person holding a certificate of title to land,

5 has legal possession of that land. In Moya Drift Farm Ltd v Theuri (1973) E. A. 114, the Court of Appeal for East Africa considered the issue in light of Kenyan statutory provisions. The trial court had dismissed a suit by the registered proprietor of land, on the ground that at the time of the unlawful entry complained of, the proprietor was not in possession. On appeal, counsel for the proprietor argued that while the decision may 10 have been in conformity with the English law, it was inconsistent with s.23 of the Registration of Titles Act of Kenya. In his judgment, Spry, V. P. said at p.115 - "I find this argument irresistible and I do not think it is necessary to examine the law of England. I cannot see how a person could possibly be described as 'the absolute and indefeasible owner' of land if he could not cause a trespasser on it to be evicted. The Act gives a 15 registered proprietor on registration and, unless there is an y other person lawfully in possession such as a tenant, I think that title carries with it legal possession; there is He noted

that s.23 of the Kenya statute was similar to s.56 of the Registration of Titles Act of Uganda, and said - "I think the decision in Moya's case represents what the law should be in Uganda. It is an authority. I therefore, hold that a person holding a 20 certificate of title has, by virtue of that title, legal possession, and can sue in trespass."

It follows that for one to prove trespass, they must show that (1) they are in possession of land, (2) the Defendant entered upon that land without permission or that their presence exceeded the permission given and (3) that the Defendant has no interest in the said land. 25 See *George Muhindo v Ali Kamanyiire* CACA 124/2016

In my view, the Defendant could not purport to come onto the land to evict the Plaintiff in non-compliance with the procedure in law. It follows that the allegation of trespass is made out.

Therefore, I find for the Defendant on issue 3 and for the Plaintiff on issue four.

Issue 5 and 6: what are the Remedies available?

The Plaintiff prayed for General Damages of USD 62,000 for the unlawful interference and 35 UGX 100,000,000/= for unlawfully putting up the suit properties for sale.

- 5 In **Principles Governing the Award of Damages in Civil Cases**, A paper by Bart Katurabe [Justice Emeritus] stated on General damages that, according to Lord McNaughten in the oft-cited case of **Stroms V. Hutchinson** [1905] AC 515, are such as the law will presume to be the direct natural or probable consequence of the act complained of.
- 10 Damages are the pecuniary recompense given by process of law to a person for the actionable wrong that another has done him. The sums payable by way of damages are sums which fall to be paid by reason of some breach of duty or obligation, whether that duty or obligation is imposed by contract, by the general law, or legislation. See **Hall Brothers SS Co. Ltd V. Young** [1939] 1 KB748, at 756 (CA)
- 15

The most important rule regarding the award of general damages is that the court must in all cases award damages with the object of compensating the Plaintiff for his or her loss. In other words, as a general rule, damages should not be used to serve any other function; neither should the Plaintiff be unjustly enriched under the guise of an award of damages nor 20 should the Defendant be unjustly punished under the same guise. See **Obongo & Another v. Municipal Council of Kisumu** [1971] EA 91; **Ongom & Another v. Attorney-General** [1979] HCB 267; **Kyambadde v. Mpigi District Administration** [1983] HCB 44; **Nsaba Buturo v. Munansi Newspaper** [1982] HCB 134; **Peter Musoke v Merger Technical Services Uganda Limited** HCCS 426/2022, **MTK (U) Limited v Attorney General & Ors**

25 HCCS 578/2022

I note that the Plaintiff whereas she claimed specific business loss did not plead and particularise any special damages. This leaves consideration of general damages.

30 It is trite law that the award of General Damages is at the Court's discretion and its intention is to compensate the aggrieved party for the inconveniences suffered as a result of the Defendant's actions.

Having found that the Defendant acted in non-compliance with the procedure for sale of the 35 mortgaged property, and in the face of evidence that the Plaintiff suffered shocks to her occupation of the suit property and her tenancy, it follows that there is a basis for the award

5 of damages. Therefore, I award none of the damages sought save general damages to the tune of UGX 10,000,000 as sufficient recompense.

The Plaintiff did not provide any evidence supporting the grant of exemplary or punitive damages pleaded. I therefore decline to grant the same.

10

Costs:

Section 27 of the Civil Procedure Act provides that costs follow the suit unless there is a strong reason to suggest the contrary and are awarded at the court's discretion.

15 In the present case, the heart of the Plaintiff's action was that there were no valid mortgages in respect of the suit properties. The court found for the Defendant on all but one property. The court found for the Plaintiff on the allegations regarding non-compliance with the procedures for sale of the mortgaged property. In the circumstances, I find that the interests of justice and fairness warrant no orders as to costs.

20

In Conclusion:

I accordingly make the following orders;

- a) The Plaintiff consented to the use of the Properties situated in Kyadondo Block 254, Plot 767 in Kansanga and Nabutiti, Kyadondo Block 254, Plot 846 in Kasanga and 25 Nabutiti and Kyadondo Block 254, Plot 766 in Kasanga and Nabutiti as security.
- b) There is a valid mortgage only in respect of the Properties situated in Kyadondo Block 254, Plot 767 in Kansanga and Nabutiti, Kyadondo Block 254, and Kyadondo Block 254, Plot 766 in Kasanga and Nabutiti as security.

-

- I so order.

[illegible]

Ocaya Thomas O. R Judge, 18th February, 2025

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