THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 040 OF 2014

BUKENYA HENRY::APPELLANT

VERSUS

REMODE ENTERPRISES LTD::::::::::::::::::::::::::::::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala (Land Division) before Murangira, J. dated 19th September, 2013 in Civil Suit No. 0405 of 2011)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JA
HON. MR. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the advantage of reading, in draft, the judgment of my learned sister Bamugemereire, JA. I am grateful to my sister for ably setting out the facts, the grounds of appeal, and the submissions for either side, and I shall not reproduce those matters in this judgment. In this judgment, I only wish to briefly set out the reasons for the conclusions that I would reach in this matter.

I shall begin by noting that at the trial, the appellant and respondent presented conflicting cases, as will be seen below.

Respondent's facts

The respondent's facts were that on 28th July, 2011, the respondent Remode Enterprises Ltd advanced a loan of Ug. Shs. 70,000,000/= to Mr. Matovu Richard on terms set out in an agreement signed on that date. According to Remode, Matovu pledged land and a house situated in Ochieng Zone, Nansana in Wakiso District as security for the loan. It appears that Matovu failed to adhere to the terms of the loan agreement. On 19th October, 2011, Remode sued Matovu and other persons who were indicated as guarantors for recovery of the outstanding money.

Appellant's facts

The appellant claimed that by a sale agreement dated 20th July, 2011, he purchased the suit land from Matovu. In October, 2011, he took possession of the suit land, only to subsequently be sued by the respondent who claimed that it held a mortgage for the suit land concluded prior to the sale agreement.

The learned trial Judge believed the respondent's case and entered judgment in its favour, hence this appeal. Below I consider the grounds of appeal.

Ground 1

In ground 1, the appellant contended that the learned trial Judge erroneously found that the respondent had a cause of action against the appellant.

The background is that on 28th July, 2011, Remode advanced a loan of Ug Shs. 70,000,000/= to Matovu Richard to be repaid according to terms set out in a loan agreement. Matovu mortgaged his house at Ochieng Zone, Nansana in Wakiso ("the suit land") as security for the loan. The loan advanced to Mr. Matovu was also guaranteed by personal guarantees of three other persons namely, Nakayiza Edith Matovu, Nakirunda Elizabeth and Lubega Robert. Nakirunda also pledged her house in Zion Estate.

It appears that the loan that Remode advanced to Matovu was not paid.

By a plaint dated 19th October, 2011, Remode sued Matovu for the outstanding loan. Remode also sought for an order permitting it to sell Matovu's house to satisfy the outstanding loan. It appears that Remode learnt, after filing its plaint, of a sale agreement dated 20th July, 2011, in which Matovu sold the suit land to the appellant, and that the latter had gone on to occupy the land. On 9th May, 2012, Remode filed an amended plaint in which it sued Bukenya for having fraudulently purchased and/or obtained registration as proprietor of the suit land. Remode sought for cancellation of Bukenya's title.

The case set out in Remode's amended plaint was therefore that Bukenya obtained registration of the suit land fraudulently, by relying on a backdated sale agreement to prove that it had bought the suit land prior to Remode's

loan/mortgage to Matovu. Remode also sought for cancellation of Bukenya's certificate of title and vacant possession.

Remode clearly had a cause of action against Bukenya. Ground 1 of the appeal ought to fail.

Ground 2

The appellant alleged, in ground 2, that the learned trial Judge erred in law and fact when he shifted the legal burden of proof from the plaintiff (respondent) to the 5th defendant (appellant). Counsel for the appellant pointed out that the appellant adduced in evidence, a sale agreement for the suit land, signed by Matovu and with the consent of his wife Nakayiza (PW2). He further pointed out that under the parole evidence rule set out in **Section 91** of the **Evidence Act, Cap. 6**, the said sale agreement was conclusive evidence of the transaction between the appellant and Matovu for purchase of the suit land and could not be contradicted by oral evidence. Counsel submitted that the learned trial Judge erred when he accepted PW2's evidence as contradicting the land sale agreement. Further, that the learned trial Judge erred when he shifted the burden on the appellant to adduce evidence to challenge PW2's evidence. Counsel submitted that the learned trial Judge's approach and findings ran counter to the parole evidence rule.

I note that **Section 91** of the **Evidence Act** provides:

> **"91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.**
>
> **When the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."**

Further relevant is Section 92 of the Evidence Act which provides:

> **"92. Exclusion of evidence of oral agreement.**

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms; but—

(a) <u>any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud,</u> intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law;

It will however be noted that the rule in Section 91 is applicable as between parties to a written contract, so as to prevent one of the parties to the said contract from adducing evidence to prove an oral agreement apart from the written contract. In the case of **Maung Kyin vs. Ma Shwe La (1918) 20 BOMLR 278**, it was held that the rule does not apply against third parties. The Court stated as follows:

"The language of the section in terms applies and applies alone as between the parties to any such instrument or their representatives in interest. Where accordingly evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains, and in such a case accordingly, the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions."

I agree with the above holding. In my view, Section 91 applies where a party seeks to adduce evidence of an oral agreement to contradict the terms contained in a written agreement. Section 92 (a) provides that notwithstanding the rule in Section 91 **"any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud".** In other words, it is permitted to adduce evidence of fraud that can invalidate an agreement or seriously cast doubt on it. This is what the respondent sought to do in the present case.

In the circumstances of the present case, whether or not the agreement for sale of the suit land by Matovu to the appellant was fraudulent, was a matter

of fact to be decided by the learned trial Judge, after considering all the evidence on record. The learned trial Judge's fact finding task could not be limited by the parole evidence rule.

Ground 2 of the appeal would also fail.

Grounds 3 and 4

Counsel for the appellant argued grounds 3 and 4 together. He submitted that the learned trial Judge erred when placed undue consideration on the consent judgment entered between the respondent and third parties in deciding the dispute between the appellant and the respondent. Counsel contended that the consent judgment was made to unfairly defeat the sale agreement that the appellant made with Matovu and his wife for the purchase of the suit land, and should not have been relied on.

I agree with counsel for the appellant's submissions on this point. In my view, considering that there was a dispute as to whether the appellant bought the suit land before it was mortgaged to the respondent, there was need for credible evidence to decide that dispute. It would be unjust for that dispute to be decided by admissions entered during the course of the trial.

However, I noted that the learned trial Judge considered the issue of whether the appellant fraudulently obtained registration as proprietor of the suit land, and the findings he made while deciding that issue are challenged in ground 5 of this appeal. I will deal with this issue, which I think is the crux of this appeal while dealing with ground 5.

In ground 4, the appellant claims that the learned trial Judge considered a consent judgment which ousted the provisions of the Mortgage Act. I will consider this issue while dealing with ground 5.

Ground 5

The appellant claimed, in ground 5, that the learned trial Judge erroneously found that he acted fraudulently while purchasing the suit land. Counsel for the appellant noted that the basis of the learned trial Judge's finding of fraud was the claim made in the respondent's pleading that the appellant backdated the land sale agreement to make it appear as if he purchased the suit land before it was mortgaged to the respondent whereas not. Counsel

submitted that there was no credible evidence to support that allegation. Further, that the learned trial Judge erroneously relied on admissions made in a contentious consent judgment to find that the appellant backdated the agreement whereas not.

In my view, the issue is whether there was credible evidence, besides the contentious consent judgment, that supported the respondent's allegation of fraud against the appellant. The respondent alleged that the land sale agreement relied on by the appellant was fraudulent because it was backdated. PW2 Edith Nakayiza, the wife to Matovu Richard who owned the suit land, testified that at the time the suit land was pledged as a security for the loan advanced by the respondent, the suit land was unencumbered. She testified that Matovu Richard sold the suit land to the appellant after it had been mortgaged to the respondent. PW2 was informed that she had signed the land sale agreement (Exhibit D5) and that the date thereon was indicated as 20th July, 2011 yet the land was mortgaged to the respondent on 28th July, 2011, and that this supported the inference that the suit land was sold to the appellant before it was mortgaged to the respondent. She testified that she had been presented with a blank sale agreement and she signed it without knowing that it would be backdated.

PW2's evidence that the land sale agreement between Matovu and the appellant was backdated was supported by evidence of PW3 Ssekubunga Robert, a local leader, who was Secretary LC1, Ochieng Zone, Nansana, Wakiso District, where the suit land was located. His evidence was that on 27th July, 2011, Kagina, an agent of the respondent visited the area and contacted him to verify the ownership of the suit land. PW3 informed Kagina that, to his knowledge, the suit land was owned by Matovu Richard and there was no adverse claim. PW3 testified that he saw the appellant in the area for the first time in October, 2011. He was in the company of the LC1 Vice Chairperson and had come to have his land sale agreement endorsed by the local leaders.

The appellant's evidence, on the other hand, was that he had purchased the suit land and signed the land sale agreement with Matovu Richard on 20th July, 2011. He also testified that he had paid the consideration for purchase of the suit land to the vendors on that same day. His evidence was supported

by the evidence of his advocate DW3 Ssempijja Mike who testified that he had prepared the land sale agreement. He also testified that he had witnessed the signing of the agreement by the appellant, Matovu and PW2, who had signed it at his office. DW3 testified that the appellant paid the consideration for the suit land to Matovu and PW2 at his office. The evidence of DW2 supported the testimony of DW1 and DW3.

DW4 testified that on 16th July, 2011 he had met with the appellant, Matovu Richard, PW2, Bukenya Muhammed and Sinabulaya Sam about purchase of the suit land by the appellant from Matovu Richard. She made a sale agreement and the same was signed by all those parties and witnessed by herself. This sale agreement was however not tendered in evidence and the learned trial Judge therefore disbelieved the evidence of DW4 on the point.

It is apparent from the above evaluation of the evidence, that the appellant and the respondent presented conflicting accounts. In my view, it is difficult to assess which version was true as each version was equally probable. I note that the learned trial Judge gave no compelling reason for believing the respondent's version over that for the appellant. It should be noted that the respondent bore the burden of proving its case against the appellant on a balance of probabilities, and because the probabilities left by the evidence were equal, it is the respondent's case that should have failed.

I would therefore allow ground 5 of the appeal.

The findings on ground 5 render it unnecessary to consider grounds 6 and 7.

In view of the reasons given above, I would find that there was insufficient evidence to support the respondent's case against the appellant. I would therefore allow the appeal, set aside the orders of the learned trial Judge against the appellant and substitute instead an order dismissing the respondent's suit as against the appellant.

As for costs, I would make no order as to costs because I consider that the respondent was a victim of Mr. Matovu's fraudulent scheme of pledging to it, property that he had earlier sold to the appellant.

Accordingly, in view of the respective judgments of Musoke, Bamugemereire, and Musota, JJA, the Court unanimously allows the appeal, sets aside the decision of the trial Court and makes no order as to costs, both of the appeal and in the Court below. Further, by majority decision (Musoke and Musota, JJA) the Court makes an order dismissing the respondent's suit in the trial Court against the appellant.

It is so ordered.

Dated at Kampala this ..... 20th ..... day of..... 03 .....2023.

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Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
HOLDEN AT KAMPALA
CIVIL APPEAL No. 040 of 2014

Coram of Justices:
Hon: Lady Justice Elizabeth Musoke, JA
Hon. Lady Justice Catherine Bamugemereire, JA
Hon. Mr. Justice Stephen Musota, JA

BUKENYA HENRY:: APPELLANT

VERSUS

REMODE ENTERPRISES LIMITED:::::::::::::: RESPONDENT

(Appeal arising from the Judgment and orders of Joseph Mulangira, J in High Court Civil Suit No. 405 of 2014 delivered on 19th September 2014 at Kampala)

JUDGMENT OF CATHERINE BAMUGEMEREIRE, JA

This is an appeal in which a third party who came on the scene belatedly claims to have a right to a property earlier pledged. A one Richard Matovu pledges his house as a security for money advanced by a moneylender. The moneylender purports to act under the Mortgage Act. Does he operate under the Moneylenders Act prevailing in 2014?

Background

The facts that gave rise to the instant appeal are that; the Respondent allegedly advanced UGX 70,000,000/=(Seventy Million Shillings) to a one Richard Matovu (the 1st defendant) on 28th July 2011. This date is called into question when the respondent claims that the transaction dates to 2008. It is alleged that the said Richard Matovu pledged his house situate at Ocheng

Zone A, Nansana in Wakiso District. When Richard Matovu failed to repay the money, the respondent (plaintiff) sued him together with the 2nd, 3rd and 4th defendants for recovery of UGX 112,000,000/=(One hundred twelve million shillings) being the amount due with interest. The respondent also claimed damages for breach of contract and an order for attachment and sale of the house situate at Ocheng Zone A, Nansana in Wakiso district.

The appellant, Henry Bukenya applied to be joined as a party to the suit claiming that he had an interest in the disputed property. His claim was that he purchased it on 20th July 2011, 6 days before it was pledged as security to the respondent (plaintiff). The respondent (plaintiff) amended the plaint to include the appellant as 5th defendant and claimed that the appellant's purported purchase of the suit premises was fraudulently introduced in order to defeat his claim.

During the scheduling conference, the respondent entered into a Consent Judgment. Richard Matovu did not file a written statement of defence and a default judgment was entered against him.

A consequential order was made to sell Matovu's house in Ochieng Zone A, Nansana Wakiso district (disputed property) and another order was made that the 5th defendant (appellant) immediately vacates the suit premises. Finally, a consequential order directing the Commissioner Land Registration to cancel the 5th defendant's (appellant) name on the Certificate of Title, general damages of

UGX 20,000,000/= (Twenty Million shillings) and Costs awarded against the 1st and 5th defendants (appellants).

Dissatisfied with the above findings and orders of the trial court, the appellant appealed to this Court.

The Memorandum of Appeal contains seven grounds of appeal as follows;

1. **That the Learned Trial Judge erred in law and fact when he found that the plaint disclosed a cause of action against the 5th defendant.**
2. **That the Learned Trial Judge erred in law and fact when he shifted the legal burden of proof from the plaintiff to the 5th defendant.**
3. **That the Learned Trial Judge erred in law and fact when he stated that the Consent Judgment to which the 5th defendant is not party had fundamental effect on his case.**
4. **That the Learned Trial Judge erred in law and fact when he held that the Consent Judgment would oust the clear provisions of the Mortgage Act.**
5. **That the Learned Trial Judge erred in law and fact when he found that the 5th defendant was fraudulent in his purchase of land.**
6. **That the Learned Trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thereby occasioning a miscarriage of justice.**

7. That the Learned Trial Judge erred in law and fact when he gave orders that are incapable of execution.

Representation

At the hearing of this appeal, learned Counsel, John Paul Baingana of Mssrs JP Baingana & Associated Advocates represented the appellant while Learned Counsel; Kenneth Kipaalu of Mssrs KTA Advocates represented the respondent.

Legal Arguments

Counsel for the appellant argued Grounds No. 1, 2, 5, 6 & 7 separately then grounds 3 and 4 jointly.

Ground No. 1: That the Learned Trial Judge erred in law and fact when he found that the plaint disclosed a cause of action against the 5th defendant.

Counsel for the appellant submitted that there was no right accruing against the appellant. Counsel contended that the first element of cause of action ought to have been answered in the negative.

Counsel further argued that the respondent's claim was for recovery of UGX 112,000,000/=. He could not claim the house before he obtained Judgment and execution. Counsel prayed that Ground No. 1 be answered in the affirmative.

In reply to this Ground, counsel for the respondent submitted that the respondent had an interest in the disputed property, it

having been pledged as security for money he advanced to the 1st defendant. Counsel contended that the respondent's right arises out of this loan agreement with Matovu Richard and therefore raises a cause of action.

Ground No. 2: That the Learned Trial Judge erred in law and fact when he shifted the legal burden of proof from the plaintiff to the 5th defendant.

Counsel for the appellant contended that the record contained a sale of land agreement and as a general rule; **section 91 of the Evidence Act** excludes oral evidence where there is evidence of a contract or a grant disposing of property.

It was counsel's contention that the Trial Judge erroneously shifted the burden of proof to the appellant and wrongly found that the appellant's failure to contradict the respondent's evidence should be considered as an admission that it was the truth. Counsel prayed that Ground No. 2 be held in the affirmative.

In response, counsel for the respondent submitted that the appellant claimed to have entered a sale agreement with the 1st and 2nd defendants, who denied the existence of the same.

It was counsel's submission that the burden rightly shifted to the appellant who was supposed to prove the validity of the agreement but no such evidence was brought to the attention of court.

Ground No. 3: **That the Learned Trial Judge erred in law and fact when he stated that the Consent Judgment to**

which the 5th defendant is not party had fundamental effect on his case.

Ground No. 4: That the Learned Trial Judge erred in law and fact when he held that the Consent Judgment would oust the clear provisions of the Mortgage Act.

Ground No. 6: **That the Learned Trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thereby occasioning a miscarriage of justice.**

On these grounds counsel for the appellant argued that the Trial Judge before analyzing the entire evidence on record concluded that the consent judgment spoke volumes against the appellant's defence to the suit. Counsel contended that the trial Judge could have discovered that the sole intention of the consent judgment was to defeat the sale agreement between the 1st, 2nd and 5th defendants and that it was an exculpatory act of the 2nd, 3rd and 4th defendants in light of the fact that there was a sale of the disputed property.

In reply, counsel for the respondent submitted that the consent judgment entered in respect of the disputed land was pertinent to the issues in contention. Counsel submitted that PW2, the purported co-vendor sold the said land together with her husband. Counsel then submitted that the land mentioned in the consent judgment was not encumbered. It was counsel's argument that this should have had an effect on the appellant's case as a whole. Counsel then submitted that the Learned Trial Judge was right to

consider the consent judgment in his ruling. Counsel further submitted that the appellant's claim that the Mortgage Act would be subrogated in the fulfillment of the court order was erroneous and ill-conceived.

Ground No. 5: That the Learned Trial Judge erred in law and fact when he found that the 5th defendant/appellant was fraudulent in his purchase of land.

Counsel for the appellant submitted that although the allegations of fraud were pleaded in the amended plaint, there was no evidence to prove that there was any connivance between the appellant, the 1st, and 2nd defendants. Counsel contended that the allegations of a back dated agreement are baseless since DW1, DW2, DW3, DW4 and PW2 all agreed that there was a sale agreement between the appellant and the 1st defendant. He prayed that this Court finds that there was no fraud in the transaction and answer ground No. 5 in the affirmative.

In reply to Ground No. 5, counsel for the respondent submitted that the entire transaction from which the appellant's purported interest arose was marred by fraud, illegality and unlawfulness. It was counsel's submission that PW2, one of the vendors denied the transaction in its entirety and the second vendor, Matovu Richard, did not file a defence at all thus a default judgment was entered against him. Counsel submitted that the fraudulent actions were confirmed by the Local Council Secretary who saw the appellant

for the first time in October requesting him to endorse the back-dated agreement.

It was counsel's averment that while the appellant was aware that the house was encumbered, he entered into an agreement for sale of the same and backdated it to create an interest in order to defeat the respondent's existing mortgage.

Ground No. 7: **That the Learned Trial Judge erred in law and fact when he gave orders that are incapable of execution.**

Counsel for the appellant submitted that the Trial Judge erred in law and fact when he gave Consequential orders to the Commissioner Land Registration to cancel the appellant's names on the Certificate of Title.

In reply, Counsel for the respondent submitted that that court has powers under **section 33 of the Judicature Act** to make such orders as are necessary to attain the ends of justice. It was counsel's submission that the claim by the appellant is devoid of merit as it fails to highlight what specific orders are incapable of execution.

Decision of the Court

I have carefully studied the court record and considered the submissions of both counsel including the authorities availed in support thereof. I have also considered other relevant laws and authorities.

First, I wish to comment on the duty of this court as a first Appellate Court. On first appeal, this court is expected to reappraise the evidence and make inferences of fact. **(rule 30 (1) (a) of the Judicature (Court of Appeal rules) Directions, SI 13-10. In Kifamunte Henry v Uganda SCCA No. 10 of 1997,** the Supreme Court articulated the principle that a first appellate court has a duty to review the evidence of the case, to reconsider the materials before the trial judge and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.

The above principles will be borne in mind as I resolve the grounds in this appeal.

Ground No. 1

That the Learned Trial Judge erred in law and fact when he found that the plaint disclosed a cause of action against the 5th defendant.

For this court to resolve the legal issues surrounding this appeal, it is important to unpack and unravel the misconceptions that have pervaded the hearing of this appeal. Let me place this case in its true context. The background to the above appeal is that the Richard Matovu entered a money-lending transaction with Remode Enterprises. This case is strewn with the misunderstanding that a money-lending agreement could be transacted under the Mortgage Act. Counsel for the respondent

added to the confusion in the trial court by making all his presumptions and submissions under the Mortgage Act, as if Remode was a Financial Institution able to create liens under the law. I found that this confusion had pervaded the whole trial and created a perception that we were dealing with an entity that could grant commercial loans at interests agreed by the Bank of Uganda.

Upon further scrutiny of the agreements involved there exists a copy of the Loan Agreement dated 28th July 2011, marked **Exhibit P.1** with the heading; "**In the Matter of the Money Lenders Act , In the Matter of the Mortgage Act...**" Under paragraph 1, Remode Enterprises Limited is described as **a company dully incorporated under the laws of Uganda and licensed as a Moneylender carrying on its business in its authorized name at its registered office situate at Plot 72 Kanjokya street P.O. Box 782,Kampala, Uganda.**

The agreement is that Remode advanced UGX70,000,000/= to a one Richard Matovu, the 1st defendant. It is alleged that Matovu and his wife, Nakayiza, the 2nd defendant pledged their house in Wakiso, Nansana as security for the payment of the loan.

I can conclude that had the trial Judge critically scrutinized the money-lending agreement, he would not have relied on the respondent's assumption that they had created a mortgage on the property.

The money-lender's agreement referred to above was entered in 2011. The suit was decided in 2013. The applicable law at the

material time was the **Moneylenders' Act, Cap 273. Section 1 (h)** defined a Moneylender to include every person whose business is that of moneylending or who advertises or announces himself or herself or holds himself or herself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or agent.

From the above definition and basing on the money-lending agreement in this case, the respondent was, precisely, a moneylender and not a mortgagor.

The misperception that this was a Mortgage arises from the moment the contract for the money lending transaction was purportedly clothed in a language purporting to create a mortgage. This in itself is a misapplication of **section 21 (1) (c) of the Money Lenders' Act Cap 273** which prohibited the application of the Mortgage Act to such transactions. When section 21 referred to equitable and legal mortgages, it did not envisage that the money-lending shacks would suddenly evolve into mortgagors, as envisaged under the Mortgage Act. A reproduction of section 21 (1) (c) is as below;

21. Saving

(1)This Act shall not apply—

(a)to any moneylending transaction where the security for repayment of the loan and interest on the loan is effected by execution of a chattels transfer in which the interest provided for is not in excess of 9 percent per year;

(b)to any transaction where a bill of exchange is discounted at a rate of interest not exceeding 9 percent per year;
(c)to any moneylending transaction where the security for repayment of the loan and interest on the loan is effected by execution of a legal or equitable mortgage upon immovable property or of a charge upon immovable property or of any bona fide transaction of moneylending upon such mortgage or charge.(2)

The question this court needs to answer is whether the above transaction falls under the Moneylender's Act cited above or whether this is a Mortgage under the Mortgage Act. This question was explored in **S.N.Shah v C.M.Patel (1961) E.A 397,** where Gould, JA while referring to S.3 (1) (b), (similar to our section 21 (1) (c)) examined the policy behind the (Mortgage)Ordinance and the mischief it sought to resolve. He noted; **"With these considerations in mind I conceive the position to be shortly this; that the words of the section allow of two alternative constructions: that the legislature did not plainly consider that a borrower offering immovables as security required the protection of the Ordinance; and that there can be no possible reason for imputing to the legislature a desire to bring such a borrower back within the protection of the Ordinance merely because he is able to provide other securities in addition to the immoveables. In the above case, the money lending transaction was secured by a mortgage and so was taken out of the scope of the ordinance."**

The wording in **Shah v Patel (supra)** can be safely applied to the transactions under the **section 21 (1) (c)** of the Money Lender's Act. In this case the Money-Lender's Act as it applied at the time could not been implied to create legal Mortgages. Indeed the legislature did not plainly consider that a lender who was offered immovables as security required the protection of the Mortgage Act; and that there can be no possible reason for imputing to the legislature a desire to bring such a lender back within the protection of the Mortgage Act merely because he is able to prove that securities in addition to the immoveables were pledged to him. Simply put, a money-lenders agreement does not become a mortgage simply by wording it as a Mortgage or by purporting to create it under the Mortgage Act No. 8 of 2009.The above provision now been imported in the new legislation that regulates moneylenders under the **Tier 4 Microfinance Institutions and Moneylenders Act, 2016 under section 98.** The purpose for the Mortgage Act was clearly spelt out as follows: **An Act to consolidate the law relating to mortgages; to repeal and replace the Mortgage Act; to provide for the creation of mortgages; for the duties of mortgagors and mortgagees regarding mortgages; for mortgages of matrimonial homes; to make mortgages take effect only as security; to provide for priority, tacking, consolidation and variation of mortgages; to provide for suits by mortgagors; the discharge of mortgages; covenants, conditions implied in every mortgage; the remedies of mortgagors and**

mortgagees in respect of mortgages; for the power of court in respect of mortgages; and for related matters.

Section 2 of the Mortgage Act, 2009 defines a **mortgage** to include any charge or lien over land or any estate or interest in land in Uganda for securing the payment of an existing or future or a contingent debt or other money or money's worth or the performance of an obligation and includes a second or subsequent mortgage, a third party mortgage and a sub mortgage.

A lien is defined by **Blacks Law Dictionary 11th Edition page 1072** to mean a charge or security or incumbrance upon property. A lien is a legal claim against a piece of property that is entered on the Registration Book, giving the lienholder a legal interest in such property. Liens are generally granted by a property owner or by a court. Once granted or awarded, the lien is filed against a specific parcel of property and recorded with the local county recorder.

A person who lends money with the intention to execute a mortgage must be subject to the prevailing laws specific to mortgages. In this present case, the respondent could not purport to conduct a money lending transaction as a moneylender and seek court redress for foreclosure as a mortgagor when he was was not a financial institution.

There is no inference from the documents admitted as exhibits in the lower court or other evidence which points towards Remode Enterprises (the respondent) as a bank or financial institution with the ability to grant mortgages. Consequently, I can safely

conclude that the respondent acted as a moneylender in execution of the loan agreement. Actions including agreements purporting to be a mortgage were illegal and unconscionable.

The loan agreement exposes the irregularities which are rife in the moneylending industry. The interest charged was excessive contrary to **section 11 and 12 of the then Money Lenders Act** which provides that if it is found that the interest charged exceeds the rate of 9 percent per year, or the corresponding rate in respect of any other period, the court shall presume for the purposes of section 11 that the interest charged is excessive and that the transaction is harsh and unconscionable. In **Francis Kiyaga v Josephine Segujja & Anor, Civil Appeal No. 37 of 2010 and Civil Appeal No 37 of 2010** (consolidated) this Court citing **Black's Law Dictionary, 8th Edition at page 4736,** defined unconscionability to mean extreme unfairness and unconscionable as having no conscious, unscrupulous, an affront to the sense of justice; decency and reasonableness.

In the instant case, the interest rate in the agreement was put at 4% per month which amounted to 48% per year. This was over and beyond the stipulated 9% interest rate under the Money Lenders Act which prevailed in 2011. It should be noted that the demand for the loaned amounts was brought prematurely. A clear view of the loan agreement indicates that the loan agreement was made on 28th July 2011. In the letter of undertaking, the 1st installment was to be paid by 30th September 2011. In the loan default letter dated 16th September 2011, addressed to Richard

Matovu, the respondent's legal officer purported to show that Richard had not complied with the loan terms as per the agreement and had failed to pay UGX 40,000,000/=by the end of August 2011. A demand note was issued to the effect that if he did not comply by end of September 2011, the company would proceed to sell the assets.

From my understating of these transactions, the loan default letter and the demand for the payment were both premature as the date indicated in the acknowledgment for the first payment; 30th September 2011 had not passed. I also find the respondent lacking in decency and reasonableness. There is also a question of legality and limitation. Remode indicated in their plaint that the loan agreement was made in 2008. This would mean that the matter was filed out of time in 2014, as alleged by Remode, the loan agreement entered in 2008. Section 19 states as follows:

19. Limitation of time for proceedings

(1)No proceedings shall lie for the recovery by a moneylender of any money lent by him or her after the commencement of this Act or of any interest in respect of that money, or for the enforcement of any agreement made or security taken after the commencement of this Act in respect of any loan made by the moneylender, unless the proceedings are commenced before the expiration of twelve months from the date on which the cause of action accrued.

Bringing proceedings to court in 2014 for a transaction which occurred twelve months after any possible lending took place

makes this suit barred for time. I agree with counsel for the appellant that this suit was out of time.

In **Fredrick J.K Zaabwe v Orient Bank & Ors, SCCA No.4 of 2006** "If a person is to be deprived of his property, then substantive justice requires that the law should have been followed in its entirety. To hold otherwise is to **allow mere technicality to defeat justice."**

The effect of a nullity was well stated by **Lord Denning in Macfory v United Africa Co. Ltd [1962]3 ALL ER 1169 at 1172** that:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of court to set it aside. It is automatically null and avoid without more ado, though it is sometimes convenient to have the court to declare it be so. So every proceeding which is founded on it is also bad. You cannot put something on nothing and expect it to stay there. It will collapse."

I find that the entire transaction on which the appeal lies was founded on an illegality. I would allow Ground No. 1 of this appeal.

2. That the Learned Trial Judge erred in law and fact when he shifted the legal burden of proof from the plaintiff to the 5th defendant.

3. That the Learned Trial Judge erred in law and fact when he stated that the Consent Judgment to which the 5th defendant is not party had fundamental effect on his case.

4. That the Learned Trial Judge erred in law and fact when he held that the Consent Judgment would oust the clear provisions of the Mortgage Act.

5. That the Learned Trial Judge erred in law and fact when he found that the 5th defendant was fraudulent in his purchase of land.

I will handle the above grounds of appeal in tandem. I am at pains to find the true positioning of the Appellant in the earlier suit. He simply came on the scene as a third-party interest but does not seem to come with clean hands. It would be unsafe to find in his favour since it is unclear whether he was not in fact an unlicensed moneylender which would make him worse than the respondent in this case. In **Geoffrey Gatete and Anor v William Kyobe Supreme Court Civil Appeal 7 of 2005** the court was faced with a similar situation although in that case the matter turned on effective service. The facts in Gatete were that in the suit, the respondent sued for the sum of shs.17,000,000/- he allegedly loaned to the partnership firm and for profit which was payable in case of default, at the rate of shs.50,000/- per day. Under the loan agreement dated 5th February 2002, the loan was repayable on 30th March 2002. It was not paid on the due date. In an affidavit in support of the summary suit, the respondent averred that the defendant has no defence to the claim. The suit was filed in the High Court registry on 11th April 2002. On the following day, counsel for the plaintiff and Matsiko Kasiimwe for GMT group

(defendant), signed a consent judgment for the sums claimed. The consent judgment was filed in court on 15th April 2002, and was formally entered and signed by the Deputy Registrar on 18th April 2002. Mulenga JSC found that it was erroneous to hold that because Matsiko Kasiimwe admitted liability by signing a consent judgment, his partners, the appellants, had no defence to the suit. Similarly, having regard to the appellants' averments, whether the said Matsiko Kasiimwe acted fraudulently either in entering into the alleged loan agreement or in consenting to the judgment is a triable issue. The Consent Judgment was set aside.

In view of holding in Gandesha, I would find that the consent judgment entered in circumstances which were fraught with illegality can be said to have been entered improperly. I would set aside the consent judgment purportedly entered.

Regarding the claims of the appellant who was simply added to this suit, the Latin maxim applies. **"He who comes into equity must come with clean hands."** Courts do not grant relief to anyone guilty of improper conduct in matters where it is found that he had did not act in good faith. The maxim operates to prevent any affirmative recovery for the person with "unclean hands," no matter how unfairly the person's adversary has treated him or her. Wood J stated in **Cross v Cross (1983) 4 FLR 235**: he who comes to equity must come with a clean hand and any conduct of the appellant which would make a grant of specific performance inequitable can prove a bar. This is illustrated in the English decision in **Dering v Earl of Winchelsea (1787) 1 Cox**

318 where a notable, Edward Dering and another had acted as surety for Dering's brother, Thomas, for the due performance by Thomas of the office of Collector of Customs. Thomas defaulted and the Crown obtained judgment from Sir Edward for the amount lost. Sir Edward then sought to obtain a contribution from the other sureties. Dering claimed that Sir Edward could not claim the share because of his own misconduct. Eyre LCB (having itemised some of Sir Edward's misconduct, including encouraging his brother to gamble, knowing his brother was using government money for this) did not accept that argument and stated that:

" . . . such a representation of Sir Edward's conduct certainly places him in a bad point of view; and perhaps it is not a very decorous proceeding in Sir Edward to come into this Court under these circumstances: . . . A man must come into a Court of Equity with clean hand".

I agree with the submission of counsel for the respondent regarding the conduct of the appellant. The appellant having been made aware that the Richard Matovu and his wife may lose the house, purported to enter into an agreement for sale of the said house. It is claimed that he may have backdated it to create an interest in order to defeat the respondent's claim. The appellant adds himself as a party to this whole claim. Two wrongs do not make a right. The respondents founded their claims on unconscionable behaviour. I have not found in their favour. However, the appellant should not be seen to benefit from an

illegality. Any party guilty of illegal or unconscionable conduct should be refused relief in equity. Accordingly let the estate lie where it falls.

In the result I would allow the appeal and set aside the judgments of the court below.

No order is made as to costs.

Dated and signed at Kampala this 20th day 03 2023.

Catherine Bamugemereire
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 040 OF 2014

BUKENYA HENRY :::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

REMODE ENTERPRISES LTD :::::::::::::::::::: RESPONDENT

(Appeal from the decision of the High Court (Land Division) before Murangira, J dated 19th September 2013 in Civil Suit No. 0405 of 2011)

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgments of my sister Catherine Bamugemereire, JA.

I agree with her reasoning and analysis that this appeal ought to be allowed. I would however make an order dismissing the respondent's suit against the appellant and set aside the orders of the learned trial Judge against the appellant. I would also make no order as to costs.

Dated this 20th day of 03 2023

Hon. Stephen Musota

JUSTICE OF APPEAL