

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE No. 0085 OF 2021

5 **CHRISTINE HOPE KANYIMA**
APPLICANT

VERSUS

10 **1. MERCHANTILE CREDIT BANK LIMITED** } **RESPONDENTS**
2. CHRIS KANYIMA }

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

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The applicant and the 2nd respondent are husband and wife having solemnised their marriage on 17th April, 1982 at Christ the King Church, in Kampala. Before her departure to the United Kingdom where she has lived since the year 2001, the couple had from the year 1986 lived on land comprised in Kyadondo Block 243 Plot 1116 at Luzira in Kampala. The title to that land is registered in the 2nd respondent's name. While the applicant contends this property constitutes their matrimonial home, the respondent refutes this and contends that their matrimonial home is located at Kashenyi village, Ruhinda sub-county, Rujumbura County in Rukungiri District.

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Sometime during the year 2014 and on multiple occasions thereafter until December, 2019 the 2nd applicant obtained a series of loans from the 1st applicant secured by a legal mortgage and further charges over Kyadondo Block 243 Plot 1116. In the process of securing those loans and executing the necessary documents, including the spousal consent, the 2nd applicant presented to the 1st applicant, an impostor he claimed to be his wife. The said impostor used the name of and signed as the applicant. The applicant was unaware of all those transactions until sometime in August, 2021 when she learnt from one of her daughters that the 2nd respondent had mortgaged the property, defaulted on the mortgage and the 1st respondent had taken steps towards foreclosure and sale of the property, hence this application.

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b. The application.

This application is made under the provisions of sections 34, 45 and 36 of *The Mortgage Act*, and Order 52 rules 1 and 3 of *The Civil Procedure Rules*. The applicant seeks Court's review of
5 various mortgages taken out by her husband, the 2nd respondent, with the 1st respondent in respect of land comprised in Kyadondo Block 243 Plot 1116, an order of cancellation of those mortgages and the costs of the application. It is the applicant's case that the said land is family land and / or a matrimonial home within the meaning of the law and that the 2nd respondent wrongfully and illegally mortgaged it to the 1st respondent without her consent. It is sometime during the month
10 of August, 2021 that she learnt from one of her daughters that the 2nd respondent had mortgaged the property, defaulted on the mortgage and the 1st respondent had taken steps towards foreclosure and sale of the property. Until that moment the applicant was unaware of the transaction. The 2nd respondent never sought her consent when he chose to mortgage the property. A search conducted at the Land Registry confirmed the existence of the mortgage,
15 hence thus application.

c. The affidavits in reply;

In the 1st respondent's affidavit in reply, it is averred that at the time of securing the mortgage,
20 the 2nd respondent presented his wife who actually signed a consent and availed the 1st respondent with her passport size photographs. The procedure adopted by the applicant is not the proper procedure for trying the issues of fraud and illegality she has raised.

In the 2nd respondent's affidavit in reply, he averred that he is sole owner of the land comprised
25 in Kyadondo Block 243 Plot 1116 at Luzira. The property has never constituted their matrimonial home with the applicant and neither can it be described as family land. The applicant neither lives on the property nor does she derive sustenance therefore. The family's land and matrimonial home are located at Kashenyi village, Ruhinda sub-county, Rujumbura County in Rukungiri District. At all material time, the applicant was aware of the 2nd
30 respondent's acquisition of loans secured by that property and the application now before Court

is a mere afterthought. The loan has since been re-scheduled and the 2nd respondent continues to service it.

d. Submissions of counsel for the applicant.

5 M/s KGN Advocates on behalf of the applicant submitted that the applicant in her affidavit in rejoinder states that the signature attributed to her is not hers and the passport photo attached is not her likeness. She has been away since 2001 which is almost twenty years. In para 4 she states how she has been supporting the husband in his ventures and she would consent when in UK whenever required. She consented on 16th January, 2010. She has been sending money and in
10 2017 completed construction of the boys' quarters on the premises. There is evidence of remittance by WhatsApp messages. Para 11 she states that she travelled to the UK with the agreement of her husband and that she has been greatly involved in the livelihood of the family and moral support. She has been directly meeting school, fess and other needs for the family. The court has to consider the intention. She has no intention to permanently relocate and has
15 strong ties in Uganda where she has her family. She is undergoing treatment for a stroke and as soon as she is done, she intends to come back. There is family life even when she lives away. She has sent money for the construction of the boys' quarters. The definition of family has ordinary residence of a family. The position of the wife is that it is family land.

20. Submissions of counsel for the 1st respondent.

M/s MSM Advocates on behalf of the 1st respondent submitted that the applicant has been away since the year 2001 and there is no evidence of return to Uganda. Her passport expired in the year 2004 and there is no proof of current status. She would have had a valid passport by now if
25 she is still Ugandan. The medical forms show her permanent address. Her children left school. She had been away for 16 years when the sickness struck. This is a connivance. It is not property from which the family derives sustenance. In *Ntale v. Equity Bank MC No. 15 of 2015* where a husband fraudulently procures consent, he should indemnify the spouse.

30. Submissions of counsel for the 2nd respondent

M/s Tumusiime, Irumba & Co. Advocates on behalf of the 2nd respondent submitted that the matrimonial home and family land is in Kashenyi village, Rujumbura in Rukungiri. In *Yahaya Walusimbi v. Justine Nakalanzi and 4 other*, CA Misc. Application No. 386 of 2018 it was held that fraud cannot be proved by affidavit.

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g. The decision.

According to section 34 of *The Mortgage Act, No. 8 of 2009*, where a mortgage has been obtained (a) through fraud, deceit, or misrepresentation by the mortgagor; or (b) in a manner or
10 containing a provision which is unlawful; the court may in the interest of justice, review the mortgage on application by either; (a) the mortgagor or mortgagee; (b) if two or more persons are joint mortgagors or joint mortgagees, by one or more of them on their own behalf; (c) by a spouse or spouses of the mortgagor; (d) by the trustee in bankruptcy of the mortgagor; (e) by a trustee in bankruptcy, receiver or liquidator of the mortgagee; or (f) by a surety. The court may
15 not declare a mortgage void unless it is satisfied that the circumstances justify it.

The application may be made (a) at any time before the mortgagor has obtained a discharge of the mortgage; or (b) on an application by the mortgagee to the court for an order for possession or the execution of such an order. Upon such application, the court may; (a) declare the mortgage
20 void; (b) direct that the mortgage shall have effect subject to such modifications as the court shall order; or (c) require the mortgagee to repay the whole or part of any sum paid under the mortgage or any related or collateral agreement by the mortgagor or any surety or other person who assumed an obligation under the mortgage whether it was paid to the mortgagee or any other person.

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The powers of court under this provision, when satisfied that the circumstances justify it and in the interest of justice, include issuing; orders voiding the mortgage, ordering a modification or rectification of aspects of the mortgage, ordering possession of the property, and ordering the mortgagee to repay the whole or part of any sum paid under the mortgage. Orders of
30 modification or rectification will most often arise when the court is satisfied that the mortgage contains material accidental or inadvertent omissions or misstatements, or obvious description

errors, affecting the rights of the parties, or due to some other sufficient cause, where in all the circumstances it would be unconscionable to leave the mistake uncorrected.

5 A party seeking rectification has to prove common intention between all the parties in order for a clause to be rectified by the Courts since common mistake is not enough to rectify a deed, and instead a clear common intention for the accomplishment of some particular purpose is required. It applies to such errors as are usually apparent by reference to other information on the face of such mortgage or on an attachment to the mortgage or by reference to other instruments in the chain of title. The correction envisaged is one that seeks to accurately reflect the agreement of
10 the parties.

The grounds for voiding a mortgage under this provision are specified as fraud, deceit, or misrepresentation by the mortgagor (for which the mortgagor is wholly responsible and the mortgagee did not in any relevant way contribute to), or on ground of containing a provision
15 which is unlawful. It is necessary though, where the application is by a joint mortgagor or spouse, for the applicant to establish that the mortgagee, by lack of proper care, caused or substantially contributed to the fraud, deceit, or misrepresentation otherwise it may be unjust for the mortgage to be voided. On the other hand, the mortgagee need not have contributed to the illegality contained in the mortgage for it to be voided.

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At common law, a claim for misrepresentation arises where one party to a contract (the representor) made an untrue statement of fact that induced the other (the representee) to enter into the contract. Such a statement can be made expressly in writing or orally, or may be implied from words or conduct. There are also occasions where silence can give rise to an actionable
25 misrepresentation. Where the misrepresentation was made knowingly, without belief in its truth, or recklessly as to its truth, the claimant may have the contract rescinded and seek damages. Where the misrepresentation was made carelessly or without the representor having reasonable grounds for believing its truth, the claimant may seek rescission and/or damages. Where a misrepresentation was made but the representor can show that they had reasonable grounds to
30 believe their statement was true, the claimant is not entitled to damages, but may be entitled to rescind the contract or to obtain damages in lieu of rescission. A defendant will have a number of

possible defences to such a claim, e.g., that the statement in question was not intended to be relied on or that the representee would have entered into the contract in any event.

While misrepresentation and deceit may be similar in nature, they are distinct legally. Deceit
5 combines intentional misrepresentation and actual knowledge of the falsity. Only intentional or fraudulent misrepresentations would support a claim of deceit (see *Deery v. Peek*, (1889) 14 App. Cas. 337). It is an act of deceit, when the mortgagor knew the statement to be false, and if made negligently when the mortgagor ought to have known it to be false, then it was a misrepresentation. Deceit involves a false representation made by the defendant, who knows it to
10 be untrue, or who has no belief in its truth, or who is reckless as to its truth. If the defendant intended that the plaintiff should act in reliance on such (see *Standard Chartered Bank v. Pakistan National Shipping Corporation* [1998] 1 Lloyds Rep 684).

On the other hand, fraud in its simplest form is deliberate misrepresentation and deception; one
15 party deceives another by misrepresenting information, facts, and figures. It is any sort of material misstatement, misrepresentation, or omission relating to the property or potential mortgage relied on by the mortgagor. Although fraud is a most broad concept incapable of precise definition, it is defined by *Black's Law Dictionary*, 5th ed., by Henry Campbell Black, West Publishing Co., St. Paul, Minnesota, 1979, thus;

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All multifarious means which human ingenuity can devise, and which are resorted to by one individual to get an advantage over another by false suggestions or suppression of the truth. It includes all surprises, tricks, cunning or dissembling, and any unfair way which another is cheated.

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It has further been adequately defined in *Fredrick J. K. Zaabwe v. Orient Bank Ltd. S. C. Civil Appeal No. 4 of 2006* as follows;

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Intentional perversion of the truth for purposes of inducing another in reliance upon, to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact whether by word or by conduct, by false or misleading allegations, or by concealments of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury.... Anything calculated

5 to deceive, whether by a single act or culmination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or the innuendo by speech or silence, word of mouth, or look or gesture ... a generic term, embracing all multifarious means which human ingenuity can devise and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.

10 For the applicant to succeed at a claim of fraud, one has to show that the acts of the mortgagor were dishonest, a wilful perversion of the truth, a total false misrepresentation of the truth and they deprived the applicant of his or her legal right. Mortgage fraud is committed by borrowers who, often with the assistance of loan officers or other personnel, misrepresent or omit relevant details about employment and income, debt and credit, or property value, status and condition with the goal of obtaining or maintaining a loan or other credit facility.

15 A not uncommon type of mortgage fraud currently is identity theft, which occurs when a mortgagor fraudulently obtains financing using biodata information of an unwilling and unaware victim spouse or a colluding spouse, with the aid of falsified documents of identification. This application is by a spouse of the mortgagor who claims to be an unwilling and unaware victim spouse, alleging that her husband secured the mortgage through fraud, deceit, and misrepresentation. However, to qualify as a victim of such conduct, the property in issue must either be family land or matrimonial property.

25 i. Whether Kyadondo Block 243 Plot 1116 at Luzira in Kampala constituted a matrimonial home at the time of the mortgage.

30 According to section 5 of *The Mortgage Act, 8 of 2009* a mortgage 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 of the mortgagor living in that matrimonial home; or (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. Section 2 of the Act defines a matrimonial home as follows;

A building or part of a building in which a husband and wife or, as the case may be, wives, and their children, if any, ordinarily reside together and includes; -

- 5 (a) where a building and its curtilage are occupied primarily for residential purposes, that curtilage and outbuildings on it; and
- (b) where a building is on or occupied in conjunction with agricultural land or pastoral land, any land allocated by one spouse to his or her spouse or in the case of a husband, to
10 his spouses for his, her, or their exclusive use;

Therefore, a property which at the time of the mortgage is ordinarily occupied by the person and his or her spouse as their family residence, is their matrimonial home. This usually includes both
15 the home itself as well as the property on which it is situated. The key phrase in both, the relevant provision and the definition section respectively, are; “spouse of the mortgagor living in that matrimonial home” and “in which a husband and wife ordinarily reside together.” Consequently, a new home under construction is not a matrimonial home because the spouses do not occupy it yet or ordinarily reside there together.

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Spouses have the capacity to make their own decisions about where they wish to live unless it is shown otherwise. Which property will be considered a matrimonial home is fact specific and based on factors such as whether both spouses regularly use the home for residential purposes. A Copple’s ordinary residence is the place where such couple resides in the ordinary course of its
25 day-to-day life. It is the place where they reside with some degree of continuity apart from accidental or temporary absences; and a person is ordinarily resident in a place when he or she intends to make his or her home for an indefinite period. This means that a property can lose the characteristic of being a matrimonial home, if some other person exercises dominion over it, or where it ceases to serve as the ordinary place of residence of the spouses, such as where it is
30 converted to some other use.

The phrase “matrimonial home” is construed according to its natural and ordinary meaning. In considering ordinary residence, the Court must therefore have regard to the: (i) time spent at the

property; (ii) the intention of the spouses; and (iii) continuity of remaining at the property (see *Shah v. Barnet London Borough Council* [1983] 1 All ER 226 and *Lysaght v. IRC* [1927] 2 KB 55). According to the natural and ordinary meaning of the phrase, a person is “ordinarily resident” in a particular place if he or she habitually and normally resides lawfully in that place from choice and for a settled purpose as part of the normal state of a person's life for the time being, whether his or her stay is of short or of long duration. Therefore, the spouses don’t have to live in the house full-time; they just have to use it as their residence from time to time. Any temporary absence does not deprive a person from ordinary residence. A person can be absent for insignificant periods and still be ordinarily resident so long as he or she maintains some tie or connection with the place. However, presence over an appreciable period of time and a settled intention to remain indefinitely are necessary to establish a matrimonial home.

Whether a person is ordinarily resident in a place is a question of fact not law. Whereas ordinary residence is about the quality and nature of the connection that the persons themselves perceive to have with an area, as opposed to the application of set criteria, it is ordinarily proved more by evidence of matters capable of objective proof than by evidence as to state of mind. The test whether a person is resident in a place is whether that place is where the person regularly, normally or customarily lives; the place where he or she has centralised his or her existence. Ordinary residence is in a place with some degree of continuity and apart from accidental or temporary absences (see *R. v. Barnet London Borough Council ex parte Shah* [1983] 2 WLR 16). It is defined by section 38A (4) of *The Land Act* as “the place where a person resides with some degree of continuity apart from accidental or temporary absences; and a person is ordinarily resident in a place when he or she intends to make that place his or her home for an indefinite period.”

A determination of the ordinary residence of any person therefore requires the consideration of many features of the residence. Courts decide each case on its own facts. Consequently, a person can be ordinarily resident in one place and still own property or have interests in another, so long as they consider the area in which they are claiming ordinary residence in as their settled abode at that point in time. It follows therefore that spouses may have more than one matrimonial home provided they regularly live in the second property for it to be considered a matrimonial home.

While a person can be ordinarily resident in more than one home at the same time, where someone divides their time between two homes, they do not have more than one ordinary residence; it must be established whether there are strong links to each of the properties. There is
5 no minimum period in which a person has to be living in a particular place for them to be considered ordinarily resident. It depends on the nature and quality of the connection to the place.

The onus of establishing that this property is a matrimonial home is upon the applicant. A party
10 claiming that a property is a matrimonial home must give evidence as to dominion over the property. Circumstances that would be relevant would include control over renovations, decoration and furnishings, managing and maintaining of such a property coupled with a regular pattern of use as the ordinary shelter of both spouses. In her affidavit supporting the application, the applicant classifies the property as her matrimonial home on account of the fact that she lived
15 there with her husband, the 2nd respondent, from the year 1986 until 2001 and that they raised their children therefrom. She also states that she has since then contributed financially to the education of the children as well as to the repair of the boys' quarters. She however has not provided evidence of a regular pattern of use of this property, for residential purposes as spouses, since the year 2001.

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It is noteworthy though that when processing the creation of the mortgage over the property, the 2nd respondent on or about 11th June, 2013 caused an impostor, who assumed the applicant's name, to sign a spousal consent to mortgage, which together they presented to the 1st respondent as an authentic instrument of consent. This conduct, although inconsistent with the 2nd
25 respondent's insistence that this was not a matrimonial home at the time, is not dispositive of the issue. This is because the expression "matrimonial home" is a word of art with a legal meaning. It is determined more or less on basis of objective facts than on the subjective views of the spouses. The subjective elements are determined objectively, since the meaning to be attributed to enacted words is a question of law, being a matter of statutory interpretation.

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It seems to me that the *prima facie* meaning of ordinary residence is a place where at the relevant time the person in fact resides. It follows that a matrimonial home is the house where a husband and wife ordinarily live in as a married couple. If the applicant had on 23rd January, 2014 when the land was first mortgaged to the 1st respondent been asked by an enquirer as to where she has since the year 2001 normally been living, I have little doubt that she would have answered “in the United Kingdom.” It is the place where, for the last decade and a half or so at the time, she had habitually and normally resided lawfully from choice and for a settled purpose, as part of the normal state of her life for the time being, and it does not matter whether it is with intent to live there permanently or indefinitely, or not. Her residence in the United Kingdom has continued uninterrupted and unabated to-date.

Whereas the applicant claims to have maintained a connection to the property now in issue, built up and established by a five-year period of physical residence prior to the year 2001, continued thereafter remotely by family associations which have endured, there are no other special circumstances which spell out a subsisting connection in real terms, considering that residence is concerned with a subsisting and not with a past local connection. There is no evidence to show that for that period of time, the applicant has in a real sense had a subsisting connection with the property in question, as one used primarily to serve her residential needs. Her passport expired in the year 2004 and there is no evidence to show that it has since been renewed or that she has travelled to Uganda since then using any other travel document. For more than twenty years, this property has not served as the applicant’s abode adopted voluntarily and for settled purposes as part of the regular order of her life for the time being. If a property is lived in for only a short time relative to the length of the marriage, it would not qualify as a matrimonial home (see *Ryan Neil John v. Berger Rosaline*, [2000] 3 SLR 647 at [59] to [61]).

A place of a person’s residence is a matter of fact, not a matter of desire. A person can be ordinarily resident somewhere he or she factually lives even if he has not chosen to live there. Conversely, a person cannot be ordinarily resident somewhere where he or she would prefer to live but does not in fact live. In *Mohammed v. Hammersmith and Fulham LBC* [2002] 1 AC 547 Lord Slynn explained this at §18:

It is clear that words like “ordinary residence” and “normal residence” may take their precise meaning from the context of the legislation in which they appear but it seems to me that the prima facie meaning of normal residence is a place where at the relevant time the person in fact resides. That therefore is the question to be asked and it is not appropriate to consider whether in a general or abstract sense such a place would be considered an ordinary or normal residence. So long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides.

While periods of temporary absences from the home for reasons such as travel, education, medical treatment, military service or incarceration A property loses its status as a matrimonial home when one of the spouses travels away from it to another place to live and work indefinitely even if he or she intends ultimately to return to it. Conversely, the arrival of a spouse in a new locale with the intention of making a home in that place for an indefinite period of time makes him or her ordinarily resident in the place even if he or she harbours an intention to return to the first place in the future. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

On the facts of this case, although the applicant and the 2nd respondent do not appear to have lived as husband and wife at any other property, by relocating to a place overseas with the intention of remaining away indefinitely, the applicant severed her residential ties with the property now in issue. For over twenty years, the applicant has not regularly, normally or customarily lived on this property. It has not served as the place where she has centralised her existence. The land now in issue is no longer property that may reasonably be regarded as necessary to this couple’s use and enjoyment as their ordinary residence as spouses. Both spouses had for over a decade before the land was mortgaged, ceased to regularly use the home for residential purposes as a married couple. It has not served as such for the last over twenty years. This issue therefore is answered in the negative; this property was not a matrimonial home at the time the 2nd respondent mortgaged it to the 1st respondent.

- ii. Whether Kyadondo Block 243 Plot 1116 at Luzira in Kampala constituted a family land at the time of the mortgage.

Section 39 (1) (a) of *The Land Act* forbids any person from mortgaging “family land” which is defined by section 38A (4) of the Act to mean; (a) on which is situated the ordinary residence of a family; (b) on which is situated the ordinary residence of the family and from which the family derives sustenance (where land from which a family derives sustenance means; (i) land which the family farms; or (ii) land which the family treats as the principal place which provides the livelihood of the family; or (iii) land which the family freely and voluntarily agrees, shall be treated as the family's principal place or source of income for food); (c) which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b); or (d) which is treated as family land according to the norms, culture, customs, traditions or religion of the family. Each of these formulations will now be considers on basis of the facts of this case.

The fundamental objective in statutory construction is to determine and carry out the intent of the Legislature. Courts will give effect to a statute's plain meaning and assume the Legislature means exactly what it says. The plain meaning can be determined from the statute's language and context, including related statutes that disclose legislative intent about the provision in question. A court will interpret a statute in light of the circumstances existing at the time of its enactment in giving effect to the intent of the Legislature. Non-technical terms that are not defined in a statute are given their ordinary meanings.

- a) Land on which is situated the ordinary residence of a family.

Section 38A (4) of *The Land Act* defines “ordinary residence” as “the place where a person resides with some degree of continuity apart from accidental or temporary absences; and a person is ordinarily resident in a place when he or she intends to make that place his or her home for an indefinite period.” Thus “ordinary residence of a family” refers to the residence in which the family’s lifestyle is centred i.e., in the ordinary course of its day-to-day life as a family, and to which the family regularly returns, if its presence is not continuous. A family’s ordinary residence depends on physical presence in a family setting in a place for an extended and regular

basis, with an intention to live there on a more or less regular basis. It involves both physical presence in a place for an extended time and an intention to reside there in the sense that the family's customary mode of life is centred in that place as contrasted with special or occasional or casual residence.

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The applicant has not placed before Court any evidence regarding the family's composition and lifestyle on basis of which it can be determined that this family's life is centred on this land. The Court is not in position to say that this is the residence where the family lives continuously, or to which the family regularly returns, if its presence is not continuous. The applicant has not
10 disproved the 2nd respondent's assertion that the family residence is at Kashenyi village, Rujumbura County in Rukungiri District as the place where this family has centralised its existence.

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b) Land on which is situated the ordinary residence of the family and from which the family derives sustenance.

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Use of the word "and" in the phrase "ordinary residence of the family and from which the family derives sustenance" is unambiguously conjunctive. Read in the context of the Act as a whole, and in light of its undisputed purpose, the use of the word "and" merely signifies that this
20 provision applies to land serving a duo purpose. This category of land is one on which the family has both a residence and a derivation of sustenance by way of; (i) farming the land; or (ii) treating it as the principal place which provides the livelihood of the family; or (iii) by freely and voluntarily agreeing that it shall be treated as the family's principal place or source of income for food.

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Apart from the applicant not having placed before this Court any evidence regarding the family's composition and lifestyle on basis of which it can be determined that this family's life is centred on this land, there is absolutely no evidence to show that the family derives any sustenance from this property. The Court is not in position to say that this is the residence where the family lives
30 continuously, or to which the family regularly returns, if its presence is not continuous, and which also serves as its source of sustenance.

- c) Land which the family freely and voluntarily agrees is to be treated to qualify either as land on which is situated the ordinary residence of the family, or one that has both the ordinary residence of the family and from which the family derives sustenance.

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This provision applies to land which despite not in fact being that which serves either as the family residence, or the duo purpose of family residence and derivation of sustenance, it should be deemed so by virtue of the free and voluntary agreement of the family. This sub-section
10 implicitly admits that the land in question does not fit the description of family land as per the foregoing provisions, but by virtue of the free and voluntary agreement of the family, it shall be taken as if it were family land although it is not or there is doubt as to whether it is.

The provision is applicable to land which by virtue of the voluntary agreement of the family, is
15 deemed to have qualities that it does not have in fact. By virtue of the free and voluntary agreement of the family, such land is taken to be family land even though there are no objective facts by which it may be categorised either as the family residence, or one that serves the duo purpose of family residence and derivation of sustenance. Although such agreement may be implied from the conduct of the family, the applicant has not adduced evidence of any such free
20 and voluntary agreement of the family.

- d) Land which is treated as family land according to the norms, culture, customs, traditions or religion of the family.

25 This provision applies to land which by virtue of the norms, culture, customs, traditions or religion of the family, is either deemed to have qualities that it does not have in fact or is categorised as family land when it would not otherwise have qualified as such. By virtue of norms, culture, customs, traditions or religion the community to which the family belongs, such land attains a character not ordinarily associated with it, and is taken to be family land. The
30 essential purpose of this provision is to allow for diversity in the characterisation of family land coloured by community-based variations based on localised practices, behaviours and beliefs.

Considering that the notion of family land may vary on account of norms, culture, customs, traditions or religion, thus rendering a uniform conception of family land almost impossible, this provision creates the flexibility needed to avoid damaging confrontations between the Court and such communities, thereby enabling the Court to balance the black letter of the Act with local norms and values.

If there are any norms, culture, customs, traditions or religion of the community to which the family belongs on basis of which this land could be characterised as family land, none have been brought to the attention of the court by the applicant. No evidence has been adduced evidence of any such norms, culture, customs, traditions or religion of this family.

iii. Whether the mortgage in respect of Kyadondo Block 243 Plot 1116 at Luzira in Kampala is vitiated by the 2nd respondent's fraud, deceit, or misrepresentation.

Since the threshold for establishing fraud, which is rooted in dishonesty, is a high one such that inadvertent errors short of actual and deliberate dishonesty would not be sufficient to discharge the burden of proof, it is trite that some categories of fraud cannot be proved by affidavit evidence (see *Yahaya Walusimbi v. Justine Nakalanzi and Four others, C. A. Misc. Application No. 386 of 2018* and *Kagoro Epimac v Samalien Properties Limited and Four others, H. C. Misc. Application No. 90 of 2020*). The reason is that fraud is a serious allegation, and the court is required to look into all the particulars of the fraud, examine all the evidence and apply the strict rules of evidence. It has long been the settled practice of the Court that the proper method of adducing evidence of fraud is by ordinary suit in which the particulars of fraud must be pleaded specifically and the allegation established by strict proof. Fraud may never be established by doubtful, vague, speculative, or inconclusive evidence. Affidavit evidence does not usually afford the parties the best opportunity to present their case fully.

The party accused of such fraud should not only be given the opportunity to plead and advance their defence to such allegations in pleadings, but also be given the opportunity to challenge the allegations by cross examination of any witnesses. This cannot properly be done where evidence is by affidavit. However, where there is incontrovertible evidence of fraud, such as in this case, it

may be determined based on affidavit evidence. Section 34 of *The Mortgage Act, No. 8 of 2009* envisages circumstances of incontrovertible evidence of fraud. Affidavits supporting applications under that section are treated as substantive evidence on issues of fraud.

5 If during the hearing it emerges that the facts relating to the fraud are in dispute and difficult of ascertainment, the parties or court may invoke Order 19 rule 2 (i) of *The Civil Procedure Rules*, order the attendance for cross-examination of the deponent. There should be special circumstances and adequate material before the court to show that in the interest of justice it is fair and just to order for the cross examination. The Court considers; the importance of the issue,
10 whether cross examination will unduly delay the proceedings, and whether the cross examination is likely to elucidate the relevant issues in controversy (see *Lt. Gen. (Rtd) Henry Tumukunde v. Attorney General and Grace Akullo, H.C. Misc. Application No. 489 of 2020*). In the instant case, the cross-examination of deponents was unnecessary since the 2nd respondent did not deny the fact that he presented to the 1st respondent, an impostor he claimed to be his wife, who in
15 signing the spousal consent, used the name of and signed as the applicant. This was a representation of a false existing fact, the 2nd respondent knew to be false and intended that it be acted upon, and the 1st applicant indeed acted upon it. The 2nd respondent engaged in deceit, misrepresentation and fraud.

20 If a fraudulent representation is relied upon, in the sense that the mortgagee would not have carried the transaction through if it had known that it was false, it does not matter that it also had some other negligent or irrational belief about another matter and, but for that belief, would not have the transaction through either. The law simply ignores the other reasons why the transaction was carried through (see *Standard Chartered Bank v. Pakistan National Shipping Corporation*,
25 *Standard Chartered Bank v Pakistan National Shipping Corporation and others and another and others (Nos 2 and 4)*, [2002] 3 WLR 1547; [2003] 1 AC 959; [2003] 1 All ER 173).

However, the materiality of the false representation to this transaction is doubtful. A material representation is a convincing statement, information or explanation made to a person to induce
30 that person to enter into a contract or to take a decision, which he or she would not have done without such persuasion. It is a representation to which a reasonable person would attach

importance in deciding his or her course of action in a transaction. It is a necessary element of any claim of fraud. A misrepresentation is material if it is of such character that if it had not been misrepresented, the transaction would not have been consummated. Accordingly, the proper test for materiality is whether the 1st respondent, as a reasonably prudent financial institution would
5 have rejected the contract if it had known the true facts concerning the fact that the person presented to it as the 2nd respondent's wife was not the applicant.

Information is considered material if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable mortgagee as having significantly altered
10 the total mix of information made available. Since the concept of materiality is focused on the total mix of information from the perspective of a reasonable mortgagee, the Court assess the materiality of a fraudulent statement through the lens of the reasonable mortgagee. To be consistent with the concept of materiality, this assessment must be objective. A materiality analysis is not a mechanical exercise, nor should it be based solely on a quantitative analysis.
15 Rather, the Court needs to thoroughly and objectively evaluate the total mix of information. Such an evaluation should take into consideration all relevant facts and circumstances surrounding the fraudulent statement, including both quantitative and qualitative factors, to determine whether an error is material to mortgagees.

20 Materiality is a matter of fact that should not be decided by any bright line test. It depends on the nature of the fraudulent statement or act judged in the surrounding circumstances. A fraudulent act cannot be material if it cannot matter to the ultimate outcome. The analysis is done by relating the fraudulent statement to its effect. A fraudulent statement or act may be considered inconsequential where it does not affect the outcome of the transaction. The total mix of
25 information in the instant case includes the fact that the land in issue is neither family land nor matrimonial property. It is land in respect of which spousal consent was not a requirement. That a fraudulent spousal consent was presented to the mortgage therefore turns out to be an inconsequential fraud.

30 In any event, neither section 34 of *The Mortgage Act, No. 8 of 2009* nor section 38A of *The Land Act* create an interest in the land in favour of the un-registered spouse, but they rather protect his

or her right to possession, i.e., grant security of occupancy. The instant case presents two victims of the 2nd respondent's fraud; the applicant and the 1st respondent. One has her claim based on a possessory right while the other is based on a legal interest. A person with a possessory interest does not own an interest in the property, but only has some present right to control it. In contrast, a legal mortgage creates an interest in the land which prevents the mortgagor from dealing with the mortgaged land while it is subject to the mortgage. The applicant's claim cannot displace that of the 1st respondent in respect of land that is neither matrimonial property nor family land. The application is misconceived and is accordingly dismissed with costs to the 1st respondent. Being guilty of fraud in the underlying transaction, no costs are awarded to the 2nd respondent.

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Delivered electronically this 30th day of January, 2023
Mubiru.....

.....**Stephen**

Stephen Mubiru
Judge,
30th January, 2023.

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