

TROPICAL BANK –V- WERE MUHWANA (S.C.C.A NO. 4 OF 2011)

The Supreme Court recently passed a judgment on execution of mortgages, loan agreements, sale of mortgaged property and spousal consent.

Background

The Respondent's home was mortgaged to Libyan Arab Uganda Bank in 1993 (before the Land Act 1998 which introduced a requirement for spousal consent for any transaction on family land). The Borrower obtained an overdraft of Ug. Shs. 50,000,000/= secured against Were's home. Default occurred and the property was sold in 1997 by Tropical Bank.

Were sued for declarations as to her being an equitable tenant in common, invalidity of mortgage, for unlawful eviction and sale, and cancellation of sale. She also claimed to have attempted to lodge a caveat before the sale, but it was never registered.

The High Court held that the mortgage was invalid as the husband signed the mortgage deed as both mortgagor and surety and that therefore the mortgage, sale and eviction were invalid.

On appeal, the Court of Appeal held that the mortgage was valid but that Were's caveat protected her from eviction and that the eviction was therefore unlawful.

On further appeal to the Supreme Court it was held that the Court of Appeal erred in holding that the eviction was unlawful on account of the caveat. There was no caveat ever registered on the property and no Registry stamp or record to show it was lodged.

The Supreme Court agreed that the mortgage deed was invalid as it was executed by the husband as a surety and there was no loan agreement executed between the Bank and the Borrower that bound the borrower to pay the loan for which Were's husband stood surety and for which the mortgaged property had been charged. The Borrower should also have signed the mortgage deed. The eviction based on an unlawful mortgage was therefore unlawful.

The Court also found that Were had an equitable interest in the property having contributed to the purchase 45% and the construction 75%.

Since there was no valid mortgage, Were was entitled to the reliefs sought. The Court ordered the Bank to refund to Were 45% of the market value of the mortgaged property at time of sale (1997) with interest at 10% from the date of sale plus costs.

The sale of property was however upheld as the buyers were not made party to the appeal.

Areas of Concern:

A major concern was the Supreme Court's finding that the Appellant (Tropical Africa Bank), which carried out the eviction and sale of the property had no locus standi in the appeal. The Court found that there was no pleading or evidence to link the Appellant to the Libyan Arab Uganda Bank Ltd, the mortgagee. The tragic and simple truth is that Libyan Arab Uganda Bank changed its name to Tropical Bank. While indeed there was no evidence on this, it would perhaps have been better practice by the Court, in the interests of justice, to ask Counsel to address the point so that the case then be decided on its merits.

Of further concern to banking is the relationship between a loan agreement and the validity of a mortgage deed. The Court found that in the absence of a signed loan agreement between the Bank and the principal debtor, the Surety (mortgagor) was absolved of all liability.

The correct legal position is that a mortgage deed provides security for a debt and if properly executed by the registered proprietor, in favour of the lender, remains valid regardless of any arrangements between the lender and borrower. In this case, the facility taken was an overdraft, and under the law, an overdraft need not be documented.

It is also of great concern that the Bank was punished for not having recognized the unregistered interest of a spouse. The Bank dealt with the registered proprietor as it was lawfully entitled to under the Registration of Titles Act (Cap 230). At that time there was no requirement for spousal consent for transactions on family land. The judgment is therefore particularly erroneous in the face of the Registration of Titles Act (Cap. 230) protection against claims of unregistered interest holders.

Conclusion:

The Supreme Court does deliver surprises every now and then. We saw the decision in *NPART v General Parts*, which questioned the execution of mortgages by companies. We also saw the decision in *Fredrick J. K Zaabwe Vs Orient Bank Limited & Others*, which turned the application of powers of attorney on its head. It is imperative that Counsel for lenders develop common positions to defend litigation that may affect the settled industry practices.

On the horizon we can see the *Belex v Crane Bank* and *Alice Okiror & Michael Okiror V Global Capital Save 2004 Limited & Ben Kavuya* cases.

Fortunately this decision will be of limited impact to the banking industry. Spousal consent is now a statutory requirement under the Land Act and Mortgage Act and at most the case is an indicator of the potential damages award if spousal consent is not obtained.

One lesson to be learnt is that a third party mortgage must be properly executed by the borrower and surety/mortgagor.