

**SUPREME COURT CIVIL APPEAL NO. 4 OF 2006
FREDRICK J. K ZAABWE VS ORIENT BANK LIMITED & OTHERS**

On the 10th July 2007, the Supreme Court of Uganda delivered a ground breaking judgment regarding the nature and effect of powers of attorney especially as regards mortgages, the duty of a mortgagee to a donor of a power of attorney and on a purchaser for value without notice. On account of some of the findings in the case, we recommend it be kept confidential.

We set out below a summary of the case.

The Appellant, an Advocate indebted to the Law Council, in the sum of Ug. Shs. 1,000,000/=, gave a power of attorney over his property (comprising his home and office) to a company called Mars Trading Co. Limited (the “Company”), part owned by one of his friends and clients, to enable the Company to borrow money from a bank. In exchange of the power of attorney, the client gave the Appellant a personal cheque to pay to the Law Council. The cheque was dishonoured.

The Company used the power of attorney to mortgage the Appellant’s property to Orient Bank (the “Bank”) to secure a loan of Ug. Shs. 15,000,000/=, which loan was used exclusively for the business of the Company. The Company defaulted on the loan and the Bank sold the Appellant’s property to a third party (the “Purchaser”) who evicted the Appellant.

The Appellant filed a suit against the Bank, the Company, the Bank’s lawyer, who also acted for the Purchaser, and the auctioneers challenging the mortgaging and sale of his property and alleging fraud on the part of the Respondents. He was unsuccessful in the High Court and in the Court of Appeal.

The Supreme Court reversed the decisions of the lower courts and found that the mortgage and sale of the property were illegal, null and void for the several reasons that we discuss below.

The Power of Attorney

The Supreme Court held that a donee of a power of attorney acts as an agent of the donor and for the donor’s benefit. The donee cannot use the power of attorney for his own benefit. The execution of the mortgage to secure the borrowing of the Company thus exceeded the authority given by the power of attorney.

The Court upheld the principle that where an agent, who has been given a power of attorney to do certain things, uses the power to do something for a proper purpose, but the act done is for the agent’s own purpose to the exclusion and detriment of the principal, the actions of the agent will be outside the scope of the power of attorney and are not even capable of ratification by the principal.

The Company and the Bank were found to be liable to the Appellant for the loss he incurred.

The Bank's liability

The Supreme Court also found the Bank liable for the loss of the Appellant raising the duty of care owed by a banker to a person whose property is mortgaged through a power of attorney.

The Supreme Court held that the Company was a customer of the Bank and the Bank considered and evaluated the business proposal of the Company and agreed to finance it. The Bank must have known that the Appellant, as owner of the mortgaged property, was not part of the Company be it as a shareholder or director. The money was put on the loan account of the Company which used it to the full knowledge of the Bank. The Supreme Court held that a fiduciary relationship exists between a bank and owner of property that is being used to secure a loan facility, which requires the bank to make a full disclosure to the owner of property in so far as the loan is concerned. Since the Bank did not make this disclosure, the Bank was jointly and severally liable to the Appellant for his loss.

In addition, the Court held that the Bank had, at the very least, constructive notice of the fraud that the Company was committing but chose to ignore it. According to the Court, a prudent bank should have asked itself why a person would give away his property to secure the borrowing of another for a transaction in which he had no interest at all. On account of that fraud, the mortgage was declared null and void.

Execution of Mortgage

The position in *General Parts (U) Limited v NPART S.C.C.A No. 5 of 1999* that where the signatures to a mortgage are not in Latin character, the mortgage is not valid, was restated and emphasised. Execution in Latin Character means that the name of the signatory should be written out in full next to his/her signature.

In this case, the Company opted by resolution, to have two signatories execute the mortgage deed on its behalf, rather than affix a company seal. This is permissible under the Registration of Titles Act (Cap.230). In cases where a company opts to appoint individuals to execute instruments on its behalf instead of using its seal, the appointed individuals are required to execute in Latin character. The mortgage deed did not however bear the names of the signatories to the mortgage, nor their capacity to sign on behalf of the Company. In addition, the witness to the signatures neither disclosed his name nor his capacity to witness instruments as provided by the Registration of Titles Act.

Such irregularity rendered the mortgage invalid.

Further still, the Company executed the mortgage as mortgagor even though it was not the registered proprietor of the property being mortgaged. The mortgage deed ought to have clearly stated that the Company was acting under a power of attorney issued in accordance with the Act. This was said to be a serious irregularity.

Purchaser for value without notice

The Bank, on default by the Company proceeded to sell the property to the Purchaser. At the time of the sale, there was a caveat on the property that had been lodged by the Appellant. The Court held that a purchaser who buys property subject to a caveat cannot claim not to have had notice, the merits or demerits of the caveat notwithstanding and cannot therefore be a *bonafide* purchaser without notice. The transfer to the Purchaser was therefore defeated by the fraud and the Court ordered the Registrar of Titles to cancel the transfer and reinstate the Appellant as the registered proprietor of the property.

One worry on this finding is that the Supreme Court condemned the Purchaser unheard and deprived him of property. This goes against fundamental tenets of natural justice. The East African Court of Appeal has held that it would be wrong to deprive a registered proprietor of land in a suit to which he was not party (*Adonia –v- Mutekanga [1970] EA 429*).

The Award

The Appellant was awarded unprecedented damages in the sum of Ug. Shs. 200,000,000/=, interest thereon, costs in the Supreme Court and in the Courts below as well as cancellation of the transfer of his property, or if the Purchaser has already transferred the property to a *bonafide* purchaser without notice, the current market value of the Property, all payable jointly and severally by the Bank and the Company.

Lessons to be learnt

1. We have hitherto advised against accepting powers of attorney for purposes of entering into mortgages on account of such powers being easily forged. This case provides yet another reason for banks to avoid transactions where powers of attorney have been granted.
2. In situations where acceptance of a power of attorney cannot be avoided, it is now imperative that the bank meets with the donor of the powers in order to explain to him/her the nature of the transaction that the power of attorney is going to be used for. The bank also has a duty to ensure that the powers are being used for and on behalf of the donor and not to his/her detriment or for the benefit of the donee of the powers.
3. Execution of documents must be conducted with caution. In all cases, where an individual executes a mortgage, the name of the signatory should appear in Latin character. This does not apply in the case of execution by a company under seal. The witness to the signatures must also indicate his/her name and his/her capacity. Only an officer in the service of the Government of Uganda or Kenya, a justice of peace, an advocate (not lawyer), a notary public, a bank manager, a minister of religion authorised to celebrate marriages within Uganda, a medical practitioner, any literate chief of the rank of a gombolola chief or a corresponding or higher rank, or any other person authorised in that behalf by the ministry by statutory instrument, are authorised to witness instruments and powers of attorney within Uganda.

4. Sales of land must be carried out only after a search on the property has been conducted and the property found to be free of any caveats. If a purchaser consents to registration of his proprietorship subject to a caveat, he must abide the result of any litigation on that caveat.