

**DECISION OF THE HIGH COURT ON VALIDITY OF MORTGAGES AND UNCONSCIONABLE INTEREST-
H.C.C.S NO. 149 OF 2010 ALICE OKIROR & MICHAEL OKIROR V GLOBAL CAPITAL SAVE 2004 LIMITED
& BEN KAVUYA**

In June 2012, the High Court of Uganda delivered a ground-breaking judgment regarding *interalia* execution of mortgages by mortgagees and unconscionable interest rates.

1.0 Background

- 1.1 The Borrower Alice Okiror obtained a loan from the Global Capital Save 2004 Limited, against a mortgage of her family home.
- 1.2 The mortgage deed was signed by the Borrower and by one of the directors of the Lender on behalf of the Lender.
- 1.3 The Borrower and her husband filed a suit seeking declarations that they had paid the loan in full, that the mortgage was invalid and seeking the return of their certificate of title.

The following issues were dealt with in the judgment;

1.3 Validity of the Mortgage:

1.3.1 Execution of a mortgage deed

1.3.1.1 The mortgage deed was drafted in such a way that it doubled as a loan agreement-containing obligations of both the mortgagor and mortgagee, and that therefore both parties needed to have (properly) executed it to make it valid.

1.3.1.2 The mortgage had been executed by a single director of the mortgagee who was neither authorized under a Power of Attorney nor by resolution and on that basis Court held that the mortgage had not been properly executed and was therefore invalid. The case was distinguished from the case of ***Olinda De Souza Figueiredo v Kassamali Nanji [1963] 1 EA 381*** in which it was held that there is no requirement for a mortgagee to sign the mortgage instrument in order to make the instrument effective and there is nothing which requires the mortgage instrument to be signed by both the mortgagor and mortgagee before it can properly be registered. In ***Olinda De Souza Figueiredo (supra)*** the mortgage deed was not in the form of a loan agreement.

1.3.2 Spousal consent

Despite oral evidence of verbal consent of the spouse, Court held that the spousal consent under the Land Act must be in writing in the prescribed form. Without written consent, the mortgage was held to be invalid.

1.3.3 Attestation of Mortgage

The attesting witness must be present when the borrower signs a mortgage deed. Attestation in any other manner is invalid.

1.4 Unconscionable Interest

1.4.3 The interest charged at 12% per month (144% per annum) was harsh and unfair and the Court exercised its discretion to award an interest of 25% per annum as proposed by the Plaintiffs.

1.5 Lessons to be learnt

- 1.5.1 It is best practice not to require execution of a mortgage deed by a mortgagee. However where a mortgagee wishes to sign a mortgage deed, proper execution by the mortgage must be done, that is, in the case of a company either by affixing its seal in accordance with its Memorandum and Articles of Association or through a duly appointed Attorney.
- 1.5.2 Spousal Consent must be obtained for each loan taken by a married individual and must be in writing in the form provided by the Land Act or Mortgage Act as relevant.
- 1.5.3 The power of the courts to revise harsh and unconscionable interest rates agreed between parties should be noted.
- 1.5.4 The decision is expected to adversely affect lending under the Money Lenders Act (Cap 273). There is a real risk that borrowers who have been paying the market moneylender interest rates may now file suit to claim refunds. It was a similar decision on Lesotho that shut down the micro finance industry in that country.
- 1.5.5 Mortgage deeds and other documents should be properly witnessed/attested by a person who is actually present at the time that the mortgage is being signed by the mortgagor. Where the attestation is in question, the witness should be available to testify in court.