

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO. 115 OF 2020

RICHARD J. MAESTRANZI JNR
(Suing Through his attorney)
MICHEAL J. MAESTRANZI:..... PLAINTIFF
VERSUS

JANET BETTY NANSAMBA:.....DEFENDANT

Before: Hon. Lady Justice Patricia Kahigi Asiimwe

Ruling on Preliminary Objections

Introduction:

1. The Plaintiff is an American national, an executor, and holder of letters of probate granted by the probate and family court of Massachusetts, USA for the Estate of the late Richard J. Maestranzi who died on 15th January 2019. The letters of probate were resealed by the High Court of Uganda on 5th December 2019. The Plaintiff is suing through his attorney Michael J. Maestranzi. The Plaintiff and his attorney are both sons of the late Richard J. Maestranzi and beneficiaries of the Estate of the late Richard J. Maestranzi.
2. The late Richard J. Maestranzi had prior to his death entered into a mortgage arrangement with the Defendant, a Ugandan National living and working in the United States who served as his home health aide. The Plaintiff's cause of action against the Defendant is for breach of mortgage agreements, special damages, general damages, and costs of the suit. The mortgage agreements were

entered into on 4th May 2018 and 9th November 2018 respectively both amounting to USD 1,210,000.

3. Sometime in 2016, the Defendant approached the late Richard Maestranzi and interested him in investing in a housing estate on her land comprised in Block 249, Plot 613 Kyadondo Mengo District Makindye Division, Bunga Kampala which was vacant. It was her proposal that the housing estate would be rented out to the American Embassy and the Defendant would pay back the money later. The late Richard Maestranzi agreed to her proposal and started sending money to the Defendant's disclosed agents in Uganda prior to his death.
4. On 30th September 2017, the above arrangement was reduced into a loan agreement between the late Richard J. Maestranzi revocable trust of 2014 and the Defendant for the purpose of financing a building project for the construction of rental apartments/units in a property comprised in Block 249, Plot 613 Kyadondo Mengo District Makindye Division, Kampala for an amount of USD 360,000. The loan was to be paid between April 2018 to April 2021 with a total sum payable of USD 450,000 inclusive of interest.
5. Subsequently, in order to protect the late Richard Maestranzi's interest in the property, the loan agreement was reduced into a legal mortgage on 4th May 2018, and a duly signed legal mortgage was executed with the Defendant. On 31st July 2018, the legal mortgage was registered vide Instrument No. KCCA00052576. The security was in respect to a principal amount of USD 500,000 inclusive of interest and it was repayable in 15 years. On 9th November 2018, a further charge was made on the suit property of the mortgage amount of USD 710,000 for a loan period of 15 years effective from the completion of the property.

The further charge was registered on 19th December 2018 vide KCCA 0057276.

6. It is the Plaintiff's case that Richard J. Maestranzi transferred various amounts of money to the Defendant. However, in the course of the construction of the apartments, it was discovered that a tune of USD 200,000 was misappropriated by some agents after which the project stalled.
7. On 25th June 2018, the late Richard J. Maestranzi through his attorney contracted Ruskor Uganda Limited at a cost of USD 319,643 to build the rest of the structure. Ruskor Uganda Limited built the rest of the structure and completed it into a magnificent three storey building housing twelve residential units of two bedrooms each and handed it over to the Plaintiffs' representatives around May 2019.
8. The Defendant was supposed to rent out the apartments and pay back the Plaintiff in installments for a period of 15 years however after the death of Richard J. Maestranzi on 15th January 2019, the Defendant denied knowledge of the loan agreement hence this present suit.

Representation:

9. The Plaintiff was represented by M/S Kakuru & Co. Advocates and the Defendant was represented by Semuyaba & Co. Advocates.

Preliminary Objections

10. When the matter came up for mention counsel for the Defendant informed the court that he had preliminary objections. He submitted on the objections and counsel for the Plaintiff requested for time to file written submissions which request was granted. The parties filed written submissions.

Defendant's submissions

11. Counsel for the Defendant made oral submissions. The first preliminary objection raised was that the case had not undergone summons for directions therefore it had abated. He quoted **Order XIA of the Civil Procedure Rules as amended** which requires a plaintiff to extract summons for directions. The Defendant's lawyer stated that it was the duty of the Plaintiff's lawyer to take out the summons for directions. He argued that the law provides that a suit which has failed to undergo fresh summons abates and it cannot even go to scheduling. He quoted the case of **Asaba Charles and Kizza Gerald Administrators of the Estate of Kafeero Andrew Lubega** where a court ruled that a suit which has not undergone summons for directions abates. He prayed that the court declares that the suit had abated.
12. The 2nd Objection was premised on the argument that there was no valid legal mortgage created over the certificate of title of the property in Kyadondo Block 249 Plot 613 Bunga registered in the name of the Defendant because the mortgagee is a Non-citizen. Counsel for the Defendant cited the case of **KCB Bank (U) Limited versus Formula Feeds Limited & 3 others versus S.C.C. Application No. 38 Of 2020** where a mortgage was found to be illegal since the land that was mortgaged was mailo land and was owned by Kenyan Nationals. The court had held that a non-citizen can only hold a leasehold hence the said mortgage transaction was illegal because a non-national was holding *mailo* land.
13. The Defendant further referred to **Biyinzika Enterprises Limited & 2 others Civil Appeal Number 018 of 2017**, where the Court of Appeal stated that the 1st Respondent a company

incorporated in Uganda but without an Articles of Association restricting transfer or issue of shares to non-citizens was a foreign company and under **Section 40(7) of The Land Act**, they could not purchase or hold mailo land. They also referred to the case of **Sudhir Ruparelia & Meera Investments versus Crane Bank (In Receivership) M.A No. 320 of 2019 arising from Civil Suit No. 0493 of 2017** where the court found that the Respondent could not own freehold titles because its majority shareholders were foreigners. Counsel for the Defendant concluded by stating that the suit is bad by law because the prayers that seek to enforce a mortgage created by a non-Ugandan citizen are illegal.

14. The 3rd preliminary objection that was raised in the written submissions was that Michael J. Maestranzi not having been the legal owner/ proprietor of the land had no locus standi to issue powers of attorney to anyone to handle issues concerning the land. Counsel referred to Section 146 of the Registration of Titles Act, Cap 230 authorizes only a proprietor of any land under the operation of this Act to issue a power of attorney and appoint any person to act for him or in any lease or mortgage or in transferring that land, lease or mortgage or otherwise. He further quoted the case of **Frederick JK. Zaabwe versus Orient Bank and others S.C.C.A. No. 04/2006**.
15. The 4th Preliminary objection is that there is no specific provision in the powers of attorney authorizing the donee to sue and appear in the courts of Uganda to prosecute this main suit. He cited the case of **Frederick JK. Zaabwe versus Orient Bank and others S.C.C.A. No. 04/2006** to support his argument that powers of attorney should be construed strictly.

16. Counsel for the Defendant also raised an objection that a holder of a general power of attorney cannot be allowed to appear as a witness, he quoted various cases to support his objection.

Plaintiff's submissions

17. In response to the preliminary objection that the suit had not abated, Counsel for the Plaintiff submitted by giving a chronological breakdown of all the events on the case to show that the case was never a dormant file despite having taken three years at a pre-trial level. Counsel for the Plaintiff gave a chronology of events of the file right from the date the Plaintiff was filed on 11th February 2020 to 26th September 2022. Counsel submitted that the record shows that the date of the last reply or pleadings which was a reply to the counterclaim and written statement of Defence was filed on 26th March 2020 during the first ever National Wide Covid 19 Lockdown period. Counsel for the Plaintiff stated that the service of the Reply to the Written statement of Defence and counterclaim were done on 25th June 2020, 5 days after the lockdown was lifted.
18. Counsel for the Plaintiff continued to submit that after the lockdown period, Lady Justice Suzan Abinyo who was handling the matter earlier before it was reallocated, fixed the matter on 5th October 2020 for mention on further directions. However, when the matter came up on 5th October 2020, the Defendants raised a preliminary objection. The court then ordered parties to file submission and the ruling on the preliminary objection was delivered on 17th February 2021 and the preliminary objection was dismissed.
19. Counsel submitted that the country experienced another lockdown between May to August 2021. Counsel noted that when the courts resumed around 25th October 2021, the

Defendant's counsel filed for review of the ruling of Justice Susan Abinyo, the court issued directions to file submissions, and the ruling was delivered on 26th September 2022, a year later. Counsel submitted that since 26th September 2022, he has letters on the court record seeking a hearing date. Counsel submitted that the file was never dormant. Counsel cited the case of **Seruwude Jude versus Swangz Avenue Civil Appeal No.39/2021** where Justice Mubiru found the use of the word "shall in light of the next provision that allows for filing a fresh suit was merely directory and not mandatory. The Plaintiff further quoted the case of **Carton Douglas Kasirye Versus Sheena Ahumuza Bageine HCMA No.150 of 2020**, where Justice Boniface Wamala noted that the amendment rules of the Civil Procedure Act concerning summons for directions introduced radical positions and advised that courts should be hesitant to apply them with full force where breach or omission is not of utmost substance.

20. With respect to the 2nd Preliminary objection that the legal mortgage created by a non-citizen is illegal. Counsel for the Plaintiff submitted that all the authorities that the Defendant has relied on are not applicable to the said matter and are distinguishable. In the cited cases of **KCB Bank(u) Limited versus Formula Feeds Limited & 3 others versus S.C.C. Application No. 38 Of 2020 Biyinzika Enterprises Limited & 2 others Civil Appeal Number 018 of 2017, Section 40(7) of The Land Act, Sudhir Ruparelia & Meera Investments versus Crane Bank (In Receivership) M.A No. 320 of 2019 arising from Civil Suit No. 0493 of 2017**, all these cases concern non-citizens holding land in Mailo and freehold as opposed to leasehold, they do not concern a non-Ugandan national creating a mortgage as a mortgagee over property owned by a Ugandan.

21. The Plaintiff's counsel further submitted that it is a common principle of mortgages that "*once a mortgage, always a mortgage*". He explained that this principle has been explained to mean that a mortgage can only ever be security for repayment of some debt, and it is neither a sale nor a transfer of the mortgaged property. He cited the case of **Amratlala Purshottam Bhimli & Another versus Gian Singh Bhabra & 3 others Civil Suit No. 298/2010**.
22. In response to the 3rd preliminary objection of locus standi counsel for the Plaintiff explained that the Plaintiff sues in his right as an executor. Counsel argued he is aware of the **1904** enactment in **Section 264 of the Succession Act** which expressly bars an executor from delegating power/authority to any other person.
23. Counsel argued that the plaintiff's locus standi before this court is derived from powers of attorney from the executor and not as a proprietor of land. He argued that the **Trustees Act, Cap 165** being a later piece of legislation that came into force 48 years after the Succession Act caters for scenarios like this case. He argued that the **Trustee's Act Cap.164** under section 2 states that it applies to trusts and executorships. **Section 1 (r) of the Trustees Act** defines *a trust or trustee* to include a personal representative. **Section 1(j) Trustee's Act Cap.164** defines a "personal representative" to include the executor. Counsel for the Plaintiff argued that **Section 23(1) of the Trustees Act Cap.164** empowers executors to employ agents to transact any business or do any act to be transacted or done in the execution of the trust. He further referred to **Section 25(1) of the Trustees Act**, that gives a trustee who intends to remain out of Uganda for a period exceeding one month to delegate to any person by power of attorney.

24. Counsel for the defendant argued that the Trustee's Act being a later Act repealed the provision in the Succession Act. He referred to **Ozoo Brothers Enterprises versus Ayikoru Milka (Civil Revision 2 of 2016)** to support his submission. Counsel concluded by stating that under the Trustees Act which repeals the Succession Act, an executor can delegate his functions to any other person by issuing powers of attorney.
25. Counsel did not respond to the 3rd and 4th Preliminary objections.

Resolution:

1st Preliminary Objection: The case had not undergone summons for directions therefore it had abated.

21. Order 11 A Rule 2 of the Civil Procedure Rules provides as follows:

Where a suit has been instituted by way of a plaint, the Plaintiff shall take out summons for directions within 28 days from the date of the last reply ...

22. Under Order 11 A Rule 6 it is provided as follows:

If the Plaintiff does not take out a summons for directions in subrule (2)... the suit shall abate.

23. In the case of **Seruwu Jude Vs. Swangz Avenue Limited** (supra) Mubiru J held that Order 11 A Rule 6 is directory and not mandatory and that the court must satisfy itself that the decision to abate a suit is necessary before it is abated.
24. In **Kagimu Moses Gava & others Versus Sekatawa Muhamed Miscellaneous Appeal No. 25 of 2020**, the Court mentioned that a holistic and judicious approach should be adopted by

courts while applying the amendments concerning the summons for directions.

25. In the case of **Carlton Douglas Kasirye Versus Sheena Ahumuza Bageine A.K.A Tasha Miscellaneous Application No. 150 of 2020**, cited by counsel for the Plaintiff, Justice Boniface Wamala stated that Order XIA of the Civil Procedure (Amendment) Rules of 2019, was intended to speed up trials by curtailing unnecessary delays. *“It was not intended to be used as a sword against parties’ live claims by strangling all under the guise that the summons for direction procedure was not strictly adhered to. Each case should be considered on its own merits and peculiarities”*. He explains that the application of the said Order should not be universal but should be applied on a case-by-case basis.
26. In the present case, I note that there have been delays in the hearing of this matter partly due to the COVID-19 pandemic and the preliminary objections raised by the defendant. The record shows that the matter has not been dormant. There are several letters from the Plaintiff seeking hearing dates. Therefore, I find that the plaintiff has not demonstrated a lack of interest in pursuing this matter. I, therefore, find that the matter did not abate. This objection therefore fails.

2nd Preliminary issue: There was no valid legal mortgage created over the suit property because the mortgagee is a non-citizen.

27. Counsel for the Defendant cited the decisions of **KCB Bank (U) Limited versus Formula Feeds Limited & 3 others versus S.C.C. Application No. 38 of 2020 Biyinzika Enterprises Limited & 2 others Civil Appeal Number 018 of 2017, Section 40(7) of The Land Act, Sudhir Ruparelia & Meera**

Investments versus Crane Bank (In Receivership) M.A No. 320 of 2019 arising from Civil Suit No. 0493 of 2017, in advancing the argument that a non-citizen cannot hold a mortgage over mailo land. However, the decisions cited are with respect to non-citizens holding land as registered proprietors in Mailo and freehold tenure as opposed to leasehold. They are not in relation to a non-Ugandan national registering a mortgage over property owned by a Ugandan.

28. Specifically, in the **KCB Bank (U) Limited versus Formula Feeds Limited & 3 others versus S.C.C. Application No. 38 Of 2020** is distinguishable from the present case. In that case, Kenyan nationals were registered proprietors of mailo land which they later mortgaged to the bank as security. The registration of Kenyans as *mailo* owners was illegal and hence the mortgage was also illegal.
29. *Section 1 of the Mortgage Act of 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.
30. **The Black's Law Dictionary, 8th Edition** page 3198 defines a mortgage as:
A conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms. A lien against property that is granted to secure an obligation (such as a debt) and that is

extinguished upon payment or performance according to stipulated terms.

31. Therefore, a mortgage is only a lien that secures payment of a debt, it is not a sale of land and therefore is not a transfer of property to the mortgagee.
32. **Section 3(1) of the Mortgage Act** provides that a person holding land under any form of land tenure may by any instrument in the prescribed form, mortgage his interest in land to secure a debt. This section means that any person under any tenure can give up his land as security for a debt. Court finds that **Section 3(1) of the Mortgage Act** allows for a mortgage to be created over any land tenure. **Article 237(3) (c) of the Constitution of the Republic of Uganda** recognizes three land tenure systems which are customary, freehold, mailo, and leasehold.
33. Furthermore, *Section 2 of the Mortgage Act No. 8 of 2009*, defines a mortgagee as “a person in whose favour a mortgage is created or subsists and includes any person deriving title under the original mortgagee”. The law does not restrict the definition to include citizenship or nationality. This means any person; a citizen or non-citizen can take on property as security for a debt.
34. According to *Section 8 (1) of the Mortgage Act*, a mortgage shall have effect as a security only and shall not operate as a transfer of any interest or right in the land from the mortgagor to the mortgagee.
35. In the case of **Bhimji & Another Vs Gian Singh & 2 Others (Civil Suit No. 298 of 2010) [2014]** court cited the case of **Erieza Wamala versus Musa Musoke, [1920 -29] 111ULR**

120 where it was held that “It is an old established rule that if money is lent on the security of land, the lender will get security and nothing more.”

36. In conclusion, a mortgage is just security for a debt, not a transfer of property. Therefore, a non-citizen can legally register a mortgage on land in Uganda. This objection therefore fails.

3rd Preliminary Objection: The Plaintiff who is not a proprietor had no locus standi to bring this suit or issue powers of attorney

37. The Defendant’s basic argument here is that the Plaintiff has no locus standi to bring a suit before this court since he is not a registered proprietor of the suit land. In this matter, the court has to determine whether the Plaintiff has locus standi before this court.
38. The **Black’s Law Dictionary** has defined locus standi as the right to bring an action. **In the case of Kithende & 2 Others Versus Eleonora Civil Appeal No. 34 of 2010** Locus standi was defined “as the right that one has to be heard in a Court of law or other appropriate proceeding. Once one has a direct interest in a matter, then one is eligible to claim relief”
39. Under paragraph 1 of the plaint, the Plaintiff’s right to sue emanates from being an executor and holder of letters of probate granted by the probate and family court of Massachusetts, USA for the Estate of the late Richard J. Maestranzi.

40. Under **Section 2(h) of the Succession Act, Cap 162** an executor is a person appointed in the last will of a deceased person to execute the terms of the will.
41. Counsel for the Defendant argued that an executor cannot grant powers of attorney to another person to sue. He referred to **Section 264 of the Succession Act** which bars an executor from delegating powers to sue or prosecute a suit hence the Plaintiff has no locus.
42. **Section 264 of the Succession Act, Cap 162** states that *“After any grant of probate or letters of administration, no person other than the person to whom the same has been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, until the probate or letters of administration has or have been recalled or revoked.”*
43. Counsel for the Plaintiff submitted that the Succession Act, Cap 162 commenced on 15th February 1906. The Trustees Act, Cap. 164 came into force in 1954. Counsel argued that the Trustees Act under section 23 allows a trustee to employ an agent to handle the affairs of the trust. Counsel argued that the Trustees Act being a latter Act that came into force 48 years after the Succession Act, repealed the provision that an executor cannot delegate their powers to sue.
44. Court notes that in this matter Richard J. Maestranzi issued powers of attorney dated 13th September 2019 to Michael Maestranzi to sue on his behalf.
45. The question before this court is whether an executor can issue powers of attorney to another to sue on their behalf. Section

264 of the Succession Act, Cap 162 expressly bars an executor from delegating powers to sue or prosecute a suit.

46. **Section 2 of the Trustees Act, Cap 164** provides that the Trustees Act applies to executorships. **Sections 23(1) and Section 25(1) empower a personal representative to employ agents** to transact any business or do any act to be transacted or done in execution of the trust. **Section 1(1) of the same Act** defines a personal representative to include an executor. An executor is defined in the succession Act, as a person appointed in the last will of a deceased person to execute the terms of the will. **Section 25(1) of the Trustees Act, Cap.164** allows a trustee (who includes a personal representative or executor) who intends to remain out of Uganda for a period exceeding one month to delegate to any person by power of attorney. **Section 25(2) of the Trustees Act, Cap.164**, states that the donor of a power of attorney shall be liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor.
47. The doctrine of implied repeal was discussed by the Learned Justice Stephen Mubiru in **Ozoo Brothers Enterprises versus Ayikoru (supra)** cited by counsel for the plaintiff where he stated that *“The implied repeal of an earlier law can be inferred only where there is enactment of a later law which had the power to override the earlier law and is totally inconsistent with the earlier law and the two laws cannot stand together... For there to be an implied repeal, there must be what is often called “such a positive repugnancy between the two provisions of the old and the new statutes that they cannot be reconciled and made to stand together”.*

48. The above-cited provisions of the Trustees Act are at odds with section 264 of the Succession Act. As pointed out by counsel for the Plaintiff, the **Trustees Act, Cap 164**, came into force 48 years later than the Succession Act. Based on the principle set out by Justice Mubiru in the case of **Ozoo Brothers Enterprises versus Ayikoru**, the Trustees Act repealed Section 264 of the Succession Act.
49. In the Singapore case of **The property between Tan Mei Sin (suing as an administrator of the Estate of Tan Kee Sion, Deceased) and Tan Ah Lim (by his litigation representative, Tan Yang Woon) in The High Court of the Republic of Singapore [2022] SGHC**, one of the issues for determination was whether an administrator can appoint another person to sue on their behalf. The court held that Section 27(1), read with S 27(7) and S 27(9), of the Trustees Act allows the original personal representatives to delegate their powers. *Section 27 (1) of the Singapore Trustees Act Cap 337*, provides as follows:
- A trustee intending to remain out of Singapore for a period exceeding 14 days may, notwithstanding any rule of law or equity to the contrary, by power of attorney, delegate to any person (including a trust corporation) the execution or exercise during his absence from Singapore of all or any trusts, powers and discretions vested in him as such trustee, either alone or jointly with any other person or persons.*
50. The above provision is very similar to *Section 25 of Uganda's Trustees Act* whose marginal note is "Power to delegate trusts during absence abroad" and provides as follows:
- (1)A trustee intending to remain out of Uganda for a period exceeding one month may, notwithstanding any rule of law or equity to the contrary, by power of*

attorney, delegate to any person, including a trust corporation, the execution or exercise during the trustee's absence from Uganda of all or any trusts, powers and discretions vested in him or her as trustee, either alone or jointly with any other person or persons; except that a person being the only other co-trustee and not being a trust corporation shall not be appointed to be an attorney under this subsection.

51. In conclusion, I find that the Trustees Act repealed Section 264 of the Succession Act and that under Section 25 of the Trustees Act, the donor of the powers of attorney had the power to delegate his powers as an executor of the estate to the deceased to the Plaintiff. Therefore, the plaintiff had locus standi to sue. The preliminary objection therefore fails.

4th Preliminary Objection: There is no specific provision in the powers of attorney authorizing the donee to sue and appear in the courts of Uganda to prosecute this main suit.

52. On 13th September 2019, Richard J. Maestranzi JNR granted powers of attorney to Michael Maestranzi. Under paragraphs 8, and 9 of the powers of attorney it is stated as follows:

8. *To pursue and make recover of the said sums in respect of all assurances, representations, and guarantees made by any person, borrower, guarantor, agent, or representative to or in favour of the donors.*
9. *To enter appearance, make claim and/or complaint, engage with any person, Authority, or agency, and pursue any and all legal and recovery proceedings against the said recipient for the full refunds and damages or incurred expenses in respect of all representations and misrepresentations by the recipient and upon which the*

donors and its representatives acted to their detriment and loss.


53. The powers of attorney therefore provide for the right to sue. This objection also fails.

5th Preliminary Objection: The Plaintiff cannot be a witness in the said suit since he is a holder of general powers of attorney.

54. Court finds this to be a premature issue since the case has not yet reached the hearing stage. The objection against any witness should be raised at the time the Plaintiff calls them. Any prior consideration of the witness' suitability will be premature and moot.

55. Court finds no merit in the Preliminary objections and dismisses them. Costs will abide by the outcome of the main suit.

Dated this 6th day of October 2023


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Patricia Kahigi Asiimwe
Judge
Delivered on ECCMIS