IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Kusalanthi Fernando
of Kandawala, Rathmalana.
PLAINTIFF

C.A. Case No. 1111/2000 (F)

D.C. Panadura Case
No.22300/MB

-Vs-

1. Weerasekara Hettiarachchige Gertrude Perera
   No. 275, Ubayasenapura,
   Rajagiriya.
2. Weerawarnakulasuriya Boosabaduge Shamaline Fernando
   of Beruwala.
   DEFENDANTS

AND NOW

Weerasekara Hettiarachchige Gertrude Perera
No. 275, Ubayasenapura,
Rajagiriya.
1st DEFENDANT-APPELLANT

-Vs-

Kusalanthi Fernando
of Kandawala, Rathmalana.
PLAINTIFF-RESPONDENT

Weerawarnakulasuriya Boosabaduge Shamaline Fernando

of Beruwala

2nd DEFENDANT-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Daphne Peiris Vissundara with Erandika Samaradivakara and Asela Rajapaksha for the 1st Defendant-Appellant.

Srihan Samaranayake for the 2nd Defendant-Respondent.

Decided on : 10.05.2019

A.H.M.D. Nawaz, J.

The issue in this appeal is whether the judgment of the District Court of *Panadura* which pronounced on the validity of the two mortgage bonds in this case as valid and effectual is correct or not. The learned District Judge of *Panadura*, after trial, concluded that the two mortgage bonds marked as P1 and 2V1 were valid and ordered the sale of the property secured under the two mortgages.

The mortgages are in favour of the Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff") and the 2nd Defendant- Respondent (hereinafter sometimes referred to as "the 2nd Defendant"). The Plaintiff-Respondent (one of the mortgage holders) instituted this action initially against the 1st Defendant-Appellant (the mortgagor on the face of the mortgage bonds) and added the 2nd Defendant-Respondent as a 2nd Defendant as it turned out that the 2nd Defendant-Respondent also held a mortgage, a primary mortgage at that, over the same property.

The Plaintiff-Respondent held, on the face of it, a secondary mortgage whilst the 2nd Defendant-Respondent was secured by a primary mortgage over the same property. So the Plaintiff amended her original plaint to bring in the 2nd Defendant as he held the primary

mortgage over the same property. This was indeed done 7 years after the original plaint had been filed.

The 2nd Defendant's primary mortgage bears the No.8425 and indicates the date of execution as 12th March 1986 **(2V1)**. The secondary mortgage that the Plaintiff held in her favour bears the No.8643 and appears to have been executed on 17th June 1986 **(P1)**. In addition, on a date in the month of June 1986, which is not specified, the 1st Defendant-Appellant (the mortgagor on the two mortgage bonds) appears to have given one Loku Liyanage Dharmasena Alwis (a clerk working in the office of his Notary called Lasantha Stembo) an irrevocable Power of Attorney **(1D1)** authorizing the said Alwis to sell, gift, lease, mortgage and affix his signature on any instrument that would have the effect of divesting the mortgagor of the property mentioned in the secondary mortgage bearing No.8643. This power of attorney gave Dharmasena Alwis enormous powers that included the appearance of the said Alwis either as a Plaintiff or witness to make use of the powers given to him. All these three instruments (the primary mortgage in favour of the 2nd Defendant-Respondent, the secondary mortgage in favour of the Plaintiff-Respondent and the irrevocable power of attorney in favour of Dharmasena Alwis-the notary's clerk) appear to have been executed on their respective dates by Lasantha Stembo-the self same notary who ran a finance company.

The learned District Judge of *Panadura* has held by his judgment that both the primary and secondary mortgages over the same property are valid and the property must be sold in execution.

How these three instruments came into being in the *Panadura* office of the notary Lasantha Stembo makes a compelling read. Before I get into the nitty gritty of the unusual way the instruments came into existence, let me revert to the pleadings.

Secondary Mortgage as alleged by the Plaintiff

The Plaintiff-Respondent came to Court on the basis that she held a secondary mortgage bearing No.8643 **(P1)** given by the 1st Defendant-Appellant. Her story in the original plaint dated 23.06.1987 and the amended plaint dated 27.07.1994 is that she lent the 1st

Defendant-Appellant Gertrude Perera money and the lending was secured by the secondary mortgage bond bearing No.8643 and dated 17.06.1986. The Plaintiff averred in her amended plaint that the 1st Defendant-Appellant was bound by the mortgage bond No.8643 which imposed an obligation on the 1st Defendant to repay the capital sum of Rs.25,000/- together with interest calculated at the rate of 24 per centum.

This amended plaint elicited two answers-one was filed by the 1st Defendant-Appellant whose property was sought to be bound in these two mortgage bonds, whilst the other was filed by the 2nd Defendant who was alleged to hold the primary mortgage over the property.

Answer of the 2nd Defendant alleging a Primary Mortgage

The money advanced to the 1st Defendant-Appellant was hers and in exchange a mortgage was executed in her favour. Notwithstanding several demands the 1st Defendant-Appellant defaulted in payment and therefore the property mortgaged must be sold in execution to realise the dues outstanding. Her mortgage gained priority over that of the Plaintiff as it was primary.

The 1st Defendant-Appellant Gertrude Perera filing her answer dated 09.09.1998 traversed these assertions of the Plaintiff and the 2nd Defendant and denied the executions of the two mortgage bonds.

Answer of the 1st Defendant-Appellant

The 1st Defendant-Appellant denied the execution of the secondary mortgage bearing No.8643. She never borrowed any money from the Plaintiff and she denied any knowledge of the mortgage bond.

As regards the primary mortgage bond which was alleged to exist in favour of the 2nd Defendant, the 1st Defendant-Appellant Gertrude Perera asserted that she had not borrowed any money from the 2nd Defendant nor did she execute any deed of mortgage bearing No.8425 (2V1).

The 1st Defendant-Appellant asserted that she borrowed only Rs.15,000/- from Stembo Finance and her signature was obtained on blank forms.

Evidence at the trial

It is crystal clear upon the evidence given by the Plaintiff that she never met the borrower Getrude Perera-the 1st Defendant-Appellant and she did not know her at all. She only invested money in the finance company of Lasantha Stembo and she did not know how the mortgage bond came into existence. Her testimony was that she was only given a copy of the Deed **(P1)** and she had been promised interest upon the investment.

Thus it is abundantly clear from the evidence of the Plaintiff that she did not witness an execution of the deed bearing No.8643-the secondary mortgage that she held in her favour. It is quite patent that the testimony of the Plaintiff went a long way to establish the case of the 1st Defendant-Appellant that she never executed this mortgage. The Plaintiff was posed a pertinent question whether she was present when the deed was executed and in response she was emphatic that she never witnessed the execution.

At this stage I hasten to add that when the mortgage bond bearing No.8643 was led in the course of the Plaintiff's evidence and produced as **P1**, it was not objected to by the 1st Defendant-Appellant but the Plaintiff's evidence was on the basis that she never knew how the instrument came into being. Though the Attorney-at-Law for the 1st Defendant-Appellant did not object to the admission of **P1**, he cross-examined the Plaintiff on the footing that she had lent the money only to Stembo and that she never knew the existence of the 1st Defendant-Appellant. In other words there was no contract of lending and borrowing between the parties and as the Roman law called it, there was no *mutuuam* between the parties. There was also no mutuality of identities between the parties in the capacities of a lender and a borrower. If at all, the *mutuuam* was between Stembo or his finance company and the borrower namely the 1st Defendant-Appellant. I will return to this aspect of the matter presently.

Non-Objection to the Secondary Mortgage in favour of the Plaintiff

Though the mortgage bond **P1** was not objected to when it was produced, there was evidence of want of due execution that came about in the course of the trial.

This engages both section 92 and its first proviso of the Evidence Ordinance.

Section 92 provides:

> *"When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms."*

Even if non-objection to the mortgage bond can give rise to the consequence of what outwardly appears to be a mortgage bond being admitted by virtue of Explanation to Section 154(3) of the Civil Procedure Code, a vulnerable borrower who finds herself converted into a mortgagor by an ingenious stratagem as we encounter in this case, can certainly lead evidence to show that what she signed was never a mortgage bond or there was no due execution thereof. Proviso (1) which is treated as one of the six exceptions to Section 92 of the Evidence Ordinance enables such adduction of evidence.

Proviso (1):

> *"Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality,* ***want of due execution****, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law."*

Woodroffe & Amir Ali in their tome Law **of Evidence** (20th Edition, Volume 3, 2018) say at p 3102-"The true rule would, therefore, appear to be that any evidence, whether of conduct or otherwise, tendered for the purpose of contradicting, varying, adding to, etc, a document is excluded by the terms of this section, unless it can be shown to be admissible under the provisos, as on the ground of fraud."

If a case comes within the provisos, then any evidence of conduct, or otherwise may be given.

In addition to the evidence of the Plaintiff that she never knew how a mortgage in her favour was created, the 1st Defendant-Appellant in her own testimony gave evidence that no proper execution of a mortgage ever took place. She described how blank papers were thrust in front of her and her signature was taken.

Thus there is sufficient evidence on the record to the effect that what appears to be an ostensible mortgage is no mortgage at all and it was indeed a sham or a fictitious instrument that came into existence without the 1st Defendant-Respondent along with the witnesses and the notary being present at one and the same time. Evidence *dehors* the document has been led to show that P1 does not partake of the characteristics of a legally admissible mortgage but it was only an illusory, fictitious and colourable device. I conclude that 1st Defendant-Appellant did not charge her property to the Plaintiff by way of a mortgage and I would perforce reverse the decision of the learned District-Judge of *Panadura* that the 1st Defendant-Appellant's property must be sold at a fiscal sale.

Having found **P1**-the secondary mortgage invalid and ineffectual, I now turn to the primary mortgage over the same property, which the 2nd Defendant alleged she had in her favour.

Primary Mortgage in favour of the 2nd Defendant No.8425 (2V1)

What distinguishes this mortgage bond from **P1** is that this was objected to by the Attorney-at-Law for the 1st Defendant-Appellant, when **2V1** was sought to be admitted. If the contents of the deed were challenged, it would amount to a denial of the execution of this mortgage bond and all that the notary Lasantha Stembo had transcribed in the deed was repudiated by the 1st Defendant-Appellant. In other words such a denial of the contents of **2V1** also meant that that the 1st Defendant-Appellant did not sign a genuine mortgage bond. The 1st Defendant-Appellant testified that the papers were blank when her signatures were obtained. In the circumstances it was incumbent upon the 2nd Defendant, who was relying upon the mortgage bond, to have summoned at least one attesting

witness to the deed in order to establish the due execution of the deed. Section 68 of the Evidence Ordinance entails such proof and I would, upon a reading of Section 68, conclude that Section 68 of the Evidence Ordinance imposes a burden on the person attempting to use a document in her/his favour to call at least one attesting witness provided the document is required by law to be attested.

Section 68 enacts:

> *"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive, and subject to the process of the court and capable of giving evidence."*

It is manifest upon the evidence led on behalf of the Plaintiff that this burden has not been discharged. It is trite that a deed of mortgage is required by law to be attested and Section 2 of the Prevention of Frauds Ordinance which may be called the palladium of our conveyancing law lays down the general rule as to the formalities required for the transfer of Immovable Property.

The section as was amended by Ordinance No.60 of 1947 deals with the following transactions:-

a. Purchase and sale of immovable property.
b. Transfer thereof.
c. Assignment of such property.
d. Mortgage thereof.
e. Promise, bargain, contract or agreement for effecting any of the above objects.
f. Promise bargain contract or agreement for establishing any security interest or encumbrance affecting immovable property.
g. Contract or agreement for the future sale or purchase of immovable property.
h. Notice given under the Thesawalamai Pre-emption Ordinance No.59 of 1947 of an intention or proposal to sell any undivided share or interest in land held in common ownership.

None of the above transactions will be of *force or avail* in law unless the following requirements are satisfied:-

a. The instrument must be in writing,
b. It must be signed either by: 1. the party making the same or
   2. some person lawfully authorized by such party.
c. It must be signed in the presence of a licensed Notary Public and two or more witnesses.
d. Such Notary Public and witnesses must be present at the same time.
e. The execution of the instrument must be duly attested by the notary and witnesses- ***Emalia Fernando v. Caroline Fernando*** 59 N.L.R. 341.

Section 68 of the Evidence Ordinance insists on proof of the formalities adumbrated in Section 2 of the Prevention of Frauds Ordinance and one of the attesting witnesses summoned to prove due execution of a deed in terms of Section 68 must speak to the fulfillment of these formalities. In fact I had occasion to discuss the full import of Section 68 in ***Dhanawathi v. Nandasena and Others*** (2016) 1 Sri.LR 18 and there was no evidence before the District Court that the mortgage bond in this case which was required by Section 2 of the Prevention of Frauds Ordinance to be notarially attested was signed by the notary and the witnesses at the same time as the maker and in her presence. On the contrary the 1st Defendant-Appellant asserted that she only signed blank papers and a lot of other borrowers were queuing in a line to sign blank papers.

The notary Lasantha Stembo had been operating a finance company, as the witnesses called it, and was in the habit of accepting deposits and lending that money to borrowers who were hard pressed by tightness of ready cash. As the 1st Defendant-Appellant testified, she was in desperate need of money and she was told by the notary that she should sign blank papers in order to have the benefit of financial accommodation.

As for the 2nd Defendant who claimed to hold a primary mortgage, her evidence was that she was in the habit of investing in the finance company of Lasantha Stembo and one fine day when she was invited to attend his office, he asked her whether she could lend money

upon the mortgage of the 1st Defendant's property. It is pursuant to this discussion that the 2nd Defendant testified that the primary mortgage (**2V1**) bearing No.8425 was executed. It was at this time that the Attorney-at-Law Stembo advanced to the 1st Defendant-Appellant a sum of Rs25,000/- in cash and another sum of Rs.25,000/- by cheque. Having retracted her earlier position that she too signed the mortgage bond, the 2nd Defendant later asserted that it was the mortgagor (the 1st Defendant-Appellant), the two witnesses and the Notary Lasantha Stembo who appended their signatures to the mortgage bond. In the attestation clause to the mortgage bond bearing No.8425, the Notary states that he does not know the mortgagor (the 1st Defendant-Appellant) but he knows the two witnesses who were in turn familiar with the executant of the deed namely the 1st Defendant-Appellant before this Court.

The testimony of the 2nd Defendant who also said that she saw the mortgagor sign the deed of mortgage as well as the documentary evidence via the attestation clause of the mortgage bond are both contradicted by the evidence of the 1st Defendant-Appellant-the so called mortgagor. The evidence of the 1st Defendant-Appellant is that she only signed some blank and incomplete papers which were thrust in front of her by Stembo. According to the 1st Defendant-Appellant, neither the so called mortgagee (the 2nd Defendant) nor the witnesses were anywhere around in the finance company.

To summarize, when the 2nd Defendant testified that she saw the 1st Defendant-Appellant, two witnesses and the notary sign the deed, the 1st Defendant-Appellant contradicted her and impeached her stance. She only signed some blank papers and until she saw the Plaintiff (the so called secondary mortgagee) and the 2nd Defendant (the so called primary mortgagee) at the trial in Court, she had never seen them before.

Thus the due execution of the mortgage bond was challenged and impeached in the case and Section 68 of the Evidence Ordinance was at once engaged.

Thus Section 68 requires that if an attested document is to be used as evidence, the execution of it must be proved by calling one attesting witness at least, if such witness is *(i)* alive, *(ii)* subject to the process of Court, and *(iii)* capable of giving evidence-*see* ***Solicitor***

General v. Ava Umma (1968) 71 N.L.R 512. As a matter of precaution, it is desirable to call more than one witness-***Arnolis v. Muttumenika*** (1896) 2 N.L.R 199.

The omission to call at least one witness, where execution is denied or not admitted by the opponent, is fatal to the admissibility of the document. So long as there is a witness alive and subject to the process of the Court, no document that is required by law to be attested shall be used as evidence until one such witness is called. Even if the living witness is the defendant, the plaintiff is bound to summon him-*see* 63-I.C. 266. Section 68 is complied with when one attesting witness is produced-76 I.C. 772.

In my view that this is a case where at least one of the attesting witnesses must have been summoned to give evidence. The attestation clause of the deed speaks to the signing of the deed by the witnesses and the mortgagor and the notary further attests that though he did not know the mortgagor, the witnesses knew the mortgagor.

When there is such divergence in testimony, the mortgage bond must have been proved by the mortgagee (the 2nd Defendant) in conformity with Section 68 of the Evidence Ordinance. One can see the serious lapses that are attributed to the notary.

The 1st Defendant-Appellant testified that the notary was nowhere around to attest any mortgage bond. He had only handed her some blank papers to sign. These allegations must have been repudiated by the 2nd Defendant in this case in the manner as enjoined by Section 68. There are early cases that state that a notary, who attests a document in terms of the Prevention of Frauds Ordinance, is generally competent to testify under Section 68 of the Evidence Ordinance-*see* ***Kiri Banda v. Ukkuwa*** (1892) 1 S.C.R 216. But this rule is subject to an important qualification. The notary is not so competent, if the executant of the document was not known to him. In other words a notary, who did not know the executant and who merely attested the document on the faith of the witnesses knowing the executant, cannot be considered an attesting witness for the purposes of Section 68 and 69 of the Ordinance. This limitation was laid down in cases such as ***Ramen Chetty v. Assen Naina*** (1909) 1 Curr.LR 256. In this case it was held that the evidence of the notary who attested a document to the effect that the executant and the witnesses signed in his

presence and in the presence of one another is not sufficient to prove a document, where the executant was not known to the notary. The same view was taken in later cases that the notary is competent, if the executant was known to him-***Seneviratne v. Mendis*** (1919) 6 C.W.R 211; ***Solicitor General v. Ava Umma*** (1968) 71 N.L.R 512 at 515-516. In ***Lawrence Marian v. Soosai Jesuthasan*** (1956) 59 N.L.R 348 at 349, 54 C.L.W 31 it was held that to become an attesting witness within the meaning of Section 68, a notary must personally know the executant and be in a position to bear witness to the fact that the signature on the deed executed before him is the signature of the executant.

So in light of the serious allegations made by the 1st Defendant-Appellant (the so called mortgagor) in this case against the notary that she was told to sign blank papers, Section 68 places a burden on the mortgagee (the Plaintiff) to have led the evidence of the other two attesting witnesses. Lasantha Stembo in his attestation asserted in the mortgage bond that he did not know the mortgagor-the executant. So it was incumbent on the 2nd Defendant to have led the two attesting witnesses. If Lasantha Stembo the notary had been available, he too could have been summoned but in view of his unfamiliarity with the executant, the adduction of the evidence of the other two attesting witnesses to the mortgage bond would have added credence to the story of the mortgagee. So the evidence of the mortgagee (the 2nd Defendant) stands alone unsupported by any proof of due execution called for by Section 68 of the Evidence Ordinance. Her evidence, unsupported by any independent evidence, is not enough to discredit the testimony of the so called mortgagor and on evidence I come to a firm conclusion that the due execution of the mortgage bond bearing No.8425 has not been established before the District Court. Though there was no issue raised on the question of due execution, the facts placed before Court raise that question, which this Court is competent to consider and evaluate in the exercise of its appellate jurisdiction. I am only reminded of what Walter Blake Odgers, Q.C has immortalised in his monumental work ***Odgers on Pleadings and Practice*** (Twentieth Edition, 1971 at pages 84 and 85).

"Conclusions of law, or of mixed law and fact, are no longer to be pleaded. It is for the Court to declare the law upon the facts proved before it.....state the facts and prove them, and the judge will then decide the question of validity....."

So it is my view I cannot accept with confidence the evidence of the 2nd Defendant that there was an execution of a mortgage bond in her favour. There are circumstances that add to make this all a sham transaction. How can one believe in the veracity of a story of an execution as told by the Plaintiff or the 2nd Defendant, when the 1st Defendant-Appellant states that she was only given blank papers to sign and there was no notary around?

No doubt, Section 33 of the Notaries Ordinance reads: "no instrument shall be deemed to be invalid by reason only of the failure of any Notary to observe any provisions of any rule set out in section 31 in respect of any matter of form" *(proviso omitted)*. But one cannot condone the wayward way in which the signature of the 1st Defendant-Appellant was obtained. If Lasantha Stembo was unavailable at the trial, at least Alwis the clerk should have been called to clarify the practice that had been adopted in the office of the notary. Did that practice have the sanction of the notary? Were the acts of getting signatures and perfecting the mortgage bonds contemporaneous or they were spaced out in time? There was no evidence before the District Court on all this. I hasten to add that there are degrees of culpability on the part of a notary and Section 33 of the Notaries Ordinance cannot come to the rescue of a sham or a simulated transaction that takes place under the guise of an execution of an instrument. If one individually looks at the acts committed by the notary, they constitute multiple infringements of the Notaries Ordinance.

What has happened in the office of the notary is of such magnitude that the story does not ring true that there were mortgage bonds in fact and in law, to which the 1st Defendant-Appellant appended her signature. Her mere signature does not establish that the 1st Defendant-Appellant in fact knew of the contents of the document which had come into existence. In my view no such knowledge ought to be inferred from the mere fact of signing or attestation. Mere signing a document does not necessarily import or indicate consent on the part of the attestator (in this case the 1st Defendant-Appellant) of the

contents of the deed. By independent evidence it must be established that the signer had knowledge of the contents of the deed. There was no evidence at all before court to import or imply consent on the part of the so called mortgagor. In the Indian case of ***Thakkar Vrajlal Bhimjee v. Thakkar Jamnadas Valjee*** (1994) 4 SCC 723, it was held that a mortgage deed was required to be proved by producing at least one of the attesting witnesses.

Even the reasoning that I adopted to assess and evaluate the evidence in relation to the mortgage bond in favour of the Plaintiff namely 8643 would equally apply to the mortgage bond bearing No 8425. In the case of the secondary mortgage bond No.8643 **(P1)** which the Plaintiff held, there was sufficient evidence to show that there was want of due execution. This evidence became admissible under proviso (1) to Section 92 of the Evidence Ordinance. When the primary mortgage bond bearing No.8425 was put in evidence, there was objection and Section 68 of the Evidence Ordinance enjoins the 2nd Defendant to prove due execution before he could use it as evidence to derive any benefit out of this deed. This burden has not been discharged by the 2nd Defendant.

Upon the evidence led for the 1st Defendant-Appellant, it has been established that there was a want of execution in regard to the bond bearing no 8643. In regard to the bond bearing No.8425, there is no proof of due execution emanating from the 2nd Defendant. In the circumstances the mortgage bond No.8425 would suffer the same fate as the bond bearing No.8643.

Conclusion in a nutshell

It has been established quite clearly that the 1st Defendant-Appellant has not in fact duly executed both bonds and *ipso facto* they did not create any interest in land for the Plaintiff and the 2nd Defendant and I proceed to reverse the finding of the learned District Judge and hold that the so called mortgage bond bearing No.8425 is a nullity.

No real agreement between the parties to the case

Before I part with this judgment, I would like to make some few observations on the concept of *mutuum* I referred to before. The Plaintiff and the 2nd Defendant may have been

separately induced to pay money to Lasantha Stembo or his Finance Company, which had been admittedly running a deposit-taking business. There is evidence in this case that the two investors-the Plaintiff and the 2nd Defendant gave their money only to Stembo. They testified so and in the attestation clauses of the two impugned mortgage bonds, Lasantha Stembo himself states that the money was initially given to him. It is thereafter that he handed the money to the 1st Defendant-Appellant. His company subsequently became insolvent and the depositors of Lasantha Stembo proceeded against the 1st Defendant-Appellant. As for the 1st Defendant-Appellant, she had borrowed only from Lasantha Stembo. The deposit-contracts of the Plaintiff and the 2nd Defendant were only with Stembo or his Company as the case may be, and Stembo, like any other debtor, became the owner of the moneys that the Plaintiff and the 2nd Defendant had given him. The deposits with Stembo were indeed loans from the Plaintiff and the 2nd Defendant to Stembo. If Stembo had taken the money on behalf of his deposit-taking institution, it would be a loan in both Roman law and English law-*see* Digest 42.5.24. For seminal English decisions for the proposition that deposits with banks are loans from customers-*see* ***Foley v. Hill*** (1848) 2 HL Cas 28; [1843-60] All ER Rep 16 and the English Court of Appeal decision in ***Joachimson v. Swiss Banking Corporation*** (1921) 3 KB 110.

Stembo became the owner of these borrowings and he states in his attestation that he handed them to the 1st Defendant-Appellant. According to the 1st Defendant-Appellant, she had nothing to do with the Plaintiff and the 2nd Defendant.

There was no *mutuum* (loan) between the Plaintiff and the 1st Defendant-Appellant or between the 2nd Defendant and the 1st Defendant-Appellant. The 1st Defendant-Appellant was borrowing her money only from Stembo and therefore her *mutuum* was only with Stembo. Stembo could not have then created a mortgage bond between the Plaintiff and the 1st Defendant-Appellant nor could there have been a mortgage bond between the 2nd Defendant and the 1st Defendant-Appellant.

If there is no *mutuum* between two parties, there could not be a mortgage bond between them. A mortgage can come into being between two parties only when there is an

underlying obligation between them. All mortgage bonds are accessory to another obligation, because the fundamental nature of a mortgage bond is the provision to security for an underlying obligation. There was no underlying obligation *(mutuum)* between the parties to this case, and however ingenious the hard and unsustainable terms that were written into the so called mortgage bonds, they could not have in law created proprietary interests for the Plaintiff and the 2nd Defendant.

In the South African case of ***Kilburn v. Estate Kilburn*** (1931) AD 501 at 505-6, the Supreme Court of Appeal of South Africa held as follows:-

> *"The settlement of a security divorced from an obligation which it secures seems to me meaningless. It is true that you can secure any obligation whether it be present or future, whether it be actually claimable or contingent. The security may be suspended until the obligation arises, but there must always be some obligation even if it be only a natural one to which the security obligation is accessory.*
>
> *It is therefore clear that by our law there must be a legal or natural obligation to which the hypothecation is accessory. If there is no obligation whatever there can be no hypothecation giving rise to a substantive claim."*

And in ***Lief NO v. Dettmann*** 1964 (2) SA 252 (A) at 259, Van Wyk JA said:-

> *"....real rights, however, can only exist in respect of a debt, existing or future, and it follows that they cannot be divorced from the debt secured by them."*

When the notary asserted in his attestation clauses of the mortgage bonds that he lent money to the 1st Defendant-Appellant, he could not have created mortgages for the Plaintiff and the 2nd Defendant who in law had not lent any money to the 1st Defendant-Appellant. There was no underlying obligation that the 1st Defendant-Appellant owed either the Plaintiff or the 2nd Defendant and therefore these two mortgages under impugnment secured no debts of the 1st Defendant-Appellant to the Plaintiff or the 2nd Defendant. That again boils down to the conclusion that the 1st Defendant-Appellant never executed real and effectual mortgage bonds. On this score as well, the mortgage bonds would become

nullified and the order made to sell the land of the 1st Defendant-Appellant is liable to be set aside.

In the circumstances I set aside the judgment dated 26th September 2000 and allow the appeal of the 1st Defendant-Appellant.

JUDGE OF THE COURT OF APPEAL