

**EMERALD HOTEL LIMITED & 3 ORS -VERSUS - BARCLAYS
BANK UGANDA LIMITED & 4 ORS (High Court Civil Suit No. 0170
of 2008) (Commercial Division).**

The High Court (Commercial Division) passed a judgment in favour of the Plaintiffs in this landmark legal suit. The honourable court observed the following among other important legal issues;

- Circumstances that warrant the sale of mortgaged property which sale must also be done lawfully;
- The validity of a management agreement signed by a receiver;
- The registration of a caveat which must satisfy the statutory requirements whereby the Caveator must claim an 'estate or interest' in order to be entitled to lodge the caveat under section 139 of the Registration Titles Act;
- The element of third-party mortgages and the validity of the security instruments on the mortgaged property;
- It illustrated how a receiver's actions make the appointing authority liable (in this case the Mortgagee/Bank).

Background.

Emerald Hotel Limited (the 1st Plaintiff) embarked on the construction of the suit premises known as the "Emerald Hotel", on Plot 3 *Semiliki Walk*- off Bombo Road, however, the suit land was registered in the names of the 3rd and 4th plaintiffs. Barclays Bank of Uganda Limited (the 1st defendant) extended to Emerald Hotel a Commercial loan facility of Ug Shs 2.7 billion attracting interest of 21% per annum as set out in the facility letter dated 4th November 2005. In a later agreement in early 2006, Emerald Hotel agreed with the Bank to raise the loan limit for the first phase of construction to Ug Shs. 3.6 billion, however, this revised arrangement was not implemented until February 2007.

Despite the execution of the above agreement by raising the loan limit, no fresh funds were actually advanced to the Emerald Hotel, although construction was furthered by other means. By August 2007, the interest accruing on the initial disbursement of Ug shs 2.7 billion had brought the Hotel's indebtedness to the Bank to a limit of Ug Shs 3.6 billion with the effect that the funds supposedly advanced as additional funds for the first phase were offset by the punitive interest charged on the said sums.

The bank's appointed Receiver Mr. Kabito Karamagi (the 2nd Defendant) published a notice of appointment as Receiver/ manager of Christal Way Limited (formerly known as Emerald Hotel) in the New Vision on 19th June 2008 and together with the 3rd Defendant advertised the mortgaged property on 16th July 2008. By 23rd June 2008, the Receiver had taken over the suit property and by 15th August 2008 had sold

it to Shumuk Properties Limited (4th Defendant) for Ug Shs. 2.2bn with a supposed deposit of Ug Shs.100,000,000 contrary to the terms of sale which stated that the sale was subject to a reserved price; the Bank's valuers put the forced sale value at Ug Shs. 2.650.000.000 and no evidence was adduced as to what the reserve price would be; and payment of full price upon acceptance of the offer.

A "Management Agreement" was further executed between the Receiver and Shumuk Properties Limited whereby the latter would run, supervise, direct and control the management aspects of the hotel from which Shumuk Properties Limited would pay a sum of Ug Shs 10 million per month as "management fees".

Shukla Mukesh (5th Defendant) later lodged a caveat on the suit property registered in the names of our clients; the 3rd and 4th Plaintiffs, claiming to be the "registered proprietor".

Judgment.

The Court observed that the appointment of the Receiver to Christal Way Limited (*formerly Emerald Hotel Limited*) which was a wrong entity was in error and invalid although the right to appoint a Receiver had accrued to the bank, however, the appointment of the Receiver to Emerald Hotel Limited was held to be lawful. It acknowledged that all the executed documents in furtherance of the mortgage from which the right to appoint a receiver accrued were valid and the circumstances in which he was appointed were justified. It further acknowledged that Section 4 of the Mortgage Act provided for this right and the Legal Mortgage executed by the bank gave it powers to "*... .. appoint any such person or persons as it thinks fit to act as receiver or receivers in the income of the Mortgaged Property or any part thereof....*". This position was given credence by all its loan documents including the Further Charge and the Collateral Debentures. However, Court noted that the Notice of appointment of the Receiver of Emerald Hotel was registered on 23rd June 2008 and thus he had earlier from 17th June 2008 interfered with the operations of the Hotel. It was thus declared by the court that the Receiver's takeover was unlawful and he was restrained from exercising these powers until all the legal and statutory process of taking possession are complied with.

The issue of sale of the mortgaged property was discussed by Court which observed that the 1st defendant (Bank) and her agents did not act in good faith and didn't obtain a fair market price, further that since the buyer (Shumuk Properties Limited) had been refunded the deposit of **Ug shs.100,000,000/-** the agreement had been rescinded. So there was no lawful and effectual sale of the suit property.

The court also resolved the issue of the validity of the "**Management Agreement**" between the Receiver and the 4th Defendant (Shumuk Properties Limited) by considering the intention of the parties when contracting. The Court, therefore, examined the agreement, the events, pre and post conduct of the parties before the

execution of the agreement and the evidence showed that there were prior arrangements between the two parties as the 4th Defendants' plans were to buy and own the property and business eventually. Subsequently, the agreement was found to be a nullity.

Court emphatically noted that the registration of a caveat must satisfy the statutory requirements whereby the caveator must claim an 'estate or interest' in order to be entitled to lodge the caveat under section 139 of the Registration Titles Act, the 5th defendant unlawfully lodged a caveat on the suit property without fulfilling the above stated statutory requirements. It was an undisputed fact of the case that the 4th and 5th plaintiffs were the registered proprietors of the suit land.

On the issue of 3rd Party Mortgages, Court observed that under the Mortgage Act 2009, the legality of third-party mortgages is codified and recognized. The 1st & 2nd Plaintiffs were not party to the debt yet they executed the Legal Mortgage. In the law of contracts, there are two fundamental principles; that only a person who is a party to a contract can sue on it (*Privity of Contract*) and secondly, that only a person who has furnished consideration can enforce rights or suffer obligations under the contract. The Court, however, noted that by allowing and granting the loan to Emerald Hotel on the basis of the land given as security, Barclays Bank provided consideration for the covenants the 3rd & 4th Plaintiff are bound to in the Mortgage Deed. Therefore, the case properly illustrated a legally recognized 3rd Party Mortgage.

Conclusion.

In light of the increasing receiverships, it should be critically observed that when a Receiver's appointment is unlawful, consequently the sale of the mortgaged property becomes illegal which adversely affects the appointing authority if the sale is so held to be illegal by the Court. Therefore the appointing authority (Bank) ought to take caution in following the legal and statutory process to ensure that the appointment of a receiver is not done prematurely and or unlawfully in case of default in payment by a client.

Since the power of acting as a Receiver is inherently derived from the appointing authority (Bank), actions accruing from this power hold both the appointing authority (bank) and the receiver liable, in the above case the court found that the Receiver's takeover of the suit property and business was unlawful in that all due process was not effected among other illegalities. The Defendants including Barclays Bank and the Receiver were jointly ordered to pay special damages, general damages amounting to Ug Shs. 18 billion, interest and costs of the suit.