**General Parts (U) Limited and another v Non-Performing Assets Recovery**

**Trust**

**Division:** Supreme Court of Uganda at Mengo

**Date of judgment:** 14 March 2006

**Case Number:** 9/05

**Before:** Odoki CJ, Tsekooko, Karokora, Mulenga and Katubeve JJSC

**Sourced by:** LawAfrica

**Summarised by:** H Kibet

*[1] Appellate procedure – Record of Appeal – Contents of the record of appeal – Procedure to be*

*followed in determining documents to be included in record – Whether the appellants had breached the*

*procedures – Rules 82 and 93 – Supreme Court Rules.*

*[2] Civil procedure – Institution of suits – Conduct of proceedings before Tribunal – Mode of institution*

*of suit – Whether a Notice of Motion a proper mode of instituting a suit before the Tribunal – Whether*

*the Tribunal had discretionary power to modify the Civil Procedure Rules – Whether institution of the*

*suit occasioned a miscarriage of justice – NPART Act – Sections 14(3) and 18 – Order 34, rule 3A –*

*Civil Procedure Rules.*

*[3] Civil procedure –* Res judicata *– Parties to suits in question – Issues to be determined in suits in*

*question – Whether the current suit was* res judicata *– Sections 6 and 7 – Civil Procedure Act.*

*[4] Land Law – Equitable Mortgages – Creation of equitable mortgages by deposit of title – Intention to*

*create security – Whether valid equitable mortgages in suit properties had been created – Section129 –*

*Registration of Titles Act.*

*[5] Limitation of actions – Suit for foreclosure – Limitation period – Burden of proof – Whether the*

*appellants had proved that the suit was time-barred – Sections 5 and 18(4) – Limitation Act.*

**Editor’s Summary**

The appellant had a bank account with UCB on which it had overdraft facilities secured by a floating debenture over its assets. In 1991, it agreed with the latter to convert part of the outstanding balance into a short-term loan. The parties also agreed to reschedule payment on condition that the first appellant provided, as further security, a legal mortgage over its property. Some of the property securing the overdraft belonged to the first appellant while the rest belonged to the second appellant, who was the Managing Director of the first appellant. Title certificates to the property were accordingly surrendered to the bank. The first appellant and the bank also executed a mortgage which was registered and entered on the titles as a legal mortgage. On 21 July 1992, following the first appellant’s default on repayments of the loan, the bank appointed a Receiver/Manager to take possession of the first appellant’s assets and recover all the outstanding debt. The appellants refused to allow the Receiver/Manager to take possession. The bank then filed suit against the first appellant in the High Court seeking a declaration that the Receiver/Manager was properly appointed. Sometime thereafter, the respondent, to whom the debt has been assigned as “a non-performing asset”, joined the suit as a co-plaintiff. The suit ultimately reached the Court of Appeal in Civil Appeal number 5 of 1999, which in March 2000 declared the appointment of the Receiver/Manager improper and the execution of the mortgage to be invalid. Sometime thereafter, the respondent made a second attempt to recover the debt by advertising the mortgaged property for sale. That precipitated a suit in the High Court by the appellants who claimed that the attempted sale was not authorised by a legal mortgage. On 28 October 2000, the High Court found in favour of the appellants. The Trust Administrator then appealed to the Court of Appeal in civil appeal number 29 of 2003. However, in May 2005, it withdrew the appeal before it could be heard. In the meantime, on 25 February 2003, the respondent had instituted a suit by Notice of Motion in the Non-Performing Assets Recovery Tribunal seeking to recover the sum of UShs 2,3 billion which it claimed was secured by, *inter alia*, equitable mortgages over the appellants’ plots of land. It asked the Tribunal for orders permitting it to foreclose the appellants’ right to redeem and to sell the property to realise the debt. On 12 February 2004, the Tribunal granted the orders. An appeal to the Court of Appeal by the appellants was dismissed on 19 August 2005. The appellants now appealed to the Supreme Court seeking reversal of the lower courts’ decision that the respondent was entitled to the order of foreclosure. The grounds on which the appellants relied were, *inter alia*, that the manner in which the suit was instituted occasioned a miscarriage of justice, that the suit was time-barred, that the matter was *res judicata*, that there were shortfalls regarding the powers of attorney and that the respondent had released or waived its rights over the mortgaged property. In their submissions, counsel for the respondent raised a preliminary issue regarding the contents of the record of appeal. They argued that parts of the record consisting of correspondence, legal opinions, records of proceedings in civil appeal number 29 of 2003, purported releases of mortgages and copies of law reports and judgments, had been included contrary to rule 82 of the Supreme Court’s Rules and that those parts ought to be expunged.

**Held** – Rule 82(3) provided for the Court of Appeal, on the application of any party or of its own motion, to make directions on the inclusion or exclusion of any documents in the record of appeal. The purpose of the provision was to ensure that the record contained only what was permissible and necessary for the determination of the appeal. Where the issue was not settled under rule 82, it was more appropriate to raise it separately rather than along with the substantive issues of the appeal. In this instance, there was no reasonable justification for the inclusion of the documents to which the respondent’s counsel had objected. These documents had been included in disregard of the principle that an appellate court acted only on material that was properly before the trial court unless for good cause the appellate court gave leave to any party to adduce additional evidence on appeal; *General Industries (U) Limited v NPART* considered. They were also included in total disregard of rule 82 of the Supreme Court Rules. The documents would therefore be disregarded save for those that the Court of Appeal had relied on in arriving at its decision. It was trite that in civil matters, the only modes of instituting suits were by plaint, originating summons and petition. A Notice of Motion was not an alternative mode of instituting any type of suit. The Court of Appeal rightly held that institution of the suit by Notice of Motion had been erroneous. However, it had erred in holding that section 14(3) of the NPART Act vested power in the Tribunal to modify the provisions of Order 34, rule 3A. The modifications to the Civil Procedure Rules permitted by this provision were those intended to permit the Tribunal to modify the procedure in order to cater for the peculiarities of trial by the Tribunal. They were not a general licence to the Tribunal to alter any rules at its discretion. In spite of this wrongful procedure, the appellants had not been prejudiced and no miscarriage of justice had been occasioned. It was therefore appropriate to invoke the principle found in article 126(2)(*e*) of the Constitution that substantive justice should not be unduly impeded by technicalities. *Per* Tsekooko JSC – Sections 16(3) and 18 of the NPART Act were complementary to each other. The former section indicated the rules governing the conduct of civil disputes while the latter stressed the necessity of affording parties an opportunity to present their respective contentions. The period of limitation for foreclosure actions was twelve years. In this instance, the suit had been filed on 25 February 2003 but neither party had been clear on the date when the limitation period had started to run. The Court of Appeal had rightly held that the burden of establishing a fact lay on the party that alleged it and, in this case, the appellants had not discharged the burden of showing that the cause of action was time-barred. Moreover, there was adequate evidence on record that showed that the suit was not time-barred. The equitable mortgages relied on by the respondent were created in August 1991 and the cause of action must therefore have accrued after this date. Counsel for the appellants’ contention that the respondent’s suit in the Tribunal and the appellant’s suit in the High Court which culminated in the withdrawn appeal were concerned with the same subject matter was misconceived. Though both suits indirectly related to the first appellant’s indebtedness to the respondent, the substantial issues for determination were different. Moreover, the two suits were not between the same parties. There was therefore no merit in the claim that the suit was *res judicata*. Section 129 of the Registration of Titles Act provided, *inter alia*, that an equitable mortgage could be made by deposit by the registered proprietor of his or her certificate of title with intent to create a security thereon. In this instance, the second appellant could not in law be permitted to claim that he deposited his certificates as Managing Director but not as registered proprietor. The second appellant had clearly deposited the title certificates with intent to create security thereon. The appellant’s argument that it was deposited with intent to secure repayment of a fresh loan was not persuasive. Moreover, the powers of attorney granted to the first appellant were not components for the creation or validation of the equitable mortgage and the so-called “shortfalls” in the powers of attorney had not been substantiated. The issue of whether the respondent had released or waived its rights had not been an issue at trial nor had it been raised on first appeal. If they had desired to rely on this plea, the onus had been on them to prove it by adducing evidence, which they had failed to do. The fact that the respondent had permitted the use of the certificates as exhibits could not be construed as evidence of release or waiver, contrary to appellants’ counsel’s contention. The order made in civil appeal 29 of 2003 for the “return” of the title certificates had no legal basis as it had not been made in consequence of a judicial investigation and adjudication on who was entitled to possession of the certificates. Once the appeal had been withdrawn, the *status quo ante* ought to have been restored. Appeal dismissed.

**Case referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*General Industries (U) Limited v NPART* criminal appeal number 25 of 1998 – **C**