IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

COMMERCIAL DIVISION

Reportable

Civil Suit No. 0577 of 2021

In the matter between

NAMASABA ZAITUNA ……. PLAINTIFF

And

1. DIAMOND TRUST BANK (U) LIMITED }
2. DFCU BANK LIMITED } ……. DEFENDANTS

Heard: 17th March, 2023.
Delivered: 21st November, 2026.

Land Law *- spousal consent - the regime is triggered by the status of the grantor as a married individual providing security over a matrimonial home or family land - the regime is personal to married individuals, not corporate entities - matrimonial home - a matrimonial home requires a building where husband and wife ordinarily reside together - the moment a property is factually occupied as a matrimonial home, spousal consent is strictly mandatory - Family land - the definition of "family land" is functional; it focuses on the use of the land (ordinary residence, sustenance, family agreement, customary treatment) rather than the identity of the registered owner - the test under section 39 (4) (b) is mandatorily conjunctive; the property must be both the family's ordinary residence and a source of sustenance - Under section 39 (4) (a), ordinary residence alone (without sustenance) is sufficient, but sustenance alone (without ordinary residence) is not, because there is no category that requires sustenance alone - the spousal consent regime under The Land Act and The Mortgage Act does not, as a matter of statutory text and legal practice, extend to properties registered in the name of a corporate entity - the Act places a duty of full disclosure of marital status on the mortgagor - the onus of ascertaining the spousal status of an intending mortgagor "is on the mortgagee - the mortgagee is deemed to have discharged the duty if the mortgagee obtains a marriage certificate issued in accordance with the laws of Uganda, and in the absence of it, a statutory declaration from the spouse or spouses of the mortgagor as proof of marriage - a mortgage will not be voided where the false representation made by the mortgagor to secure the mortgage is immaterial to the transaction - where land was neither family land nor matrimonial property at the time it was mortgaged, fraudulent spousal consent is inconsequential fraud that cannot justify cancellation of the mortgage.*

JUDGMENT

STEPHEN MUBIRU, J.

The plaintiff's claim.

[1] The plaintiff on or about 10th November, 2013 underwent a solemn Islamic marriage with a one Mr. Wamukwe Kadiri Gishu. It is her case that together with her said husband, they owned property comprised in; LRV 2991 Folio 4 Plot 44 at Nkokonjeru Court, Mbale registered in the name of her husband, Mr. Wamukwe Kadiri Gishu, and LRV 4421 Folio 22 Plot 80 Kumi Road in Mbale registered in the name of their company, M/s WK's Hardware Limited. It is her case that he was at all material time following their marriage, in effective possession of the land comprised in the two titles, whereupon she operated a hardware business, mercantile retail business and hotel accommodation. It is from that property that the family derived income for its sustenance.

[2] Without her knowledge and consent, her said husband mortgaged the two properties to the defendants. She only got to know about the transaction during or around mid-November, 2020 when her husband brought consent forms to her requiring her signature to consent to a mortgage. She discovered that her said husband had previously mortgaged both properties to the 2nd defendant, who later assigned the mortgage to the 1st defendant. She seeks to have the mortgage annulled for illegality, a permanent injunction restraining the defendants from further dealings with the property, an award of general and exemplary damages, interest and costs.

The 1st defendant's defence to the claim.

[3] By its written statement of defence, the 1st defendant asserts that LRV 4421 Folio 22 Plot 80 Kumi Road in Mbale being registered in the name of their company, M/s WK's Hardware Limited, it did not require the plaintiff's consent to being

mortgaged. That side, the 1st defendant on 17th July, 2019 obtained the plaintiff's spousal consent to the mortgaging of titles to both properties. The two title deed were thereafter offered as security for a loan of shs. 6,250,000,000/= The 1st defendant is a *bona fide* mortgage. The suit against the 1st defendant is brought in bad faith in a bid to prevent the 1st defendant from recovering the money due on the loan.

The 2nd defendant's defence to the claim.

[4] By its written statement of defence, the 2nd defendant asserts that both properties are registered in the name of M/s WK's Hardware Limited, they are commercial properties that do not constitute either matrimonial or family land and therefore did not require the plaintiff's prior consent before they could be mortgaged.

The reply to the written statements of defence.

[5] In reply, the plaintiff asserts that the property comprised in LRV 4421 Folio 22 Plot 80 Kumi Road in Mbale, which together with that comprised in LRV 2991 Folio 4 Plot 44 at Nkokonjeru Court, Mbale had hitherto constituted matrimonial property, was transferred by her husband into the name of M/s WK's Hardware Limited without her consent. It was later mortgaged to the defendants, again without her consent.

The questions for determination;

[6] At the joint scheduling conference conducted by Court on 20th February, 2023 the following issues were mutually agreed upon by the parties for the Court's determination;

1. Whether the land comprised in LRV 2991 Folio 4 Plot 44 Nkokonjeru Port Road Mbale constitutes the plaintiff's family land.

2. If so, whether the spousal consent of Namasobo Zaituni was sufficient for this transaction.
3. Whether the 1st defendant exercised due diligence in obtaining the spousal consent.
4. Whether the plaintiff is entitled to the remedies sought.

The final submissions of counsel for the plaintiffs/ counter defendants;

[7] Although Counsel for the plaintiff were at the close of the defence case given a schedule within which to file their final written submissions, at the time of writing this judgment none had been filed. The Court has for that reason proceeded to write and deliver the judgment without this input.

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The final submissions of counsel for the 1st defendant.

[8] Counsel for the 1st defendant submitted that the evidence clearly shows that the plaintiff is not ordinarily resident at Plot 44 Nkokonjeru Mbale. Instead, her witness statement states that she is "resident at Plot 14 Lugard Road, Malukhu, Industrial Division, Mbale City." She in fact further confirmed this position in her testimony during the trial. Additionally, the plaintiff did not lead any affirmative evidence to show that Plot 44 is her ordinary residence together with her family. She instead only sought to show that she and her family derive sustenance from Plot 44. The evidence shows that Plot 44 is a commercial property housing a hotel by the names of "Visitors Inn." This can be seen from the Valuation Report submitted in evidence by the 1st defendant dated 28th January, 2019 (exhibit D. Ex.8) where it is indicated "a hotel/commercial property (accommodation and lodge) branded as Visitors Inn developed with two blocks which are attached together block 1 having 5 levels and block 2 having 4 levels all fully complete."

[9] The plaintiff's reliance on derivation of sustenance alone (which claim is equally unproved as the receipts tendered in evidence were clearly fabricated), is not

helpful to her as the law (section 38 (4) (b) of *The Land Act*) requires that the land purported to be family land be not only a source of sustenance for the family, but also the family's ordinary residence. The test is mandatorily conjunctive. If the test were not conjunctive, then virtually all commercial properties in the country would be subject to spousal consent as every family does derive some level of sustenance from every commercial property that either spouse may own. The law makers were therefore cautious in creating a conjunctive test that singles out property on which a family both ordinarily lives, and also draws sustenance from. The clearest example is land on which sits both a matrimonial home as well as agricultural land that is farmed by the family for its income. The plaintiff does not ordinarily reside on Plot 44, which property houses Visitors Inn. Therefore, the property neither qualifies as family land nor as a matrimonial home since ordinary residential status is critical to both.

[10] During reexamination D.W.1 Mr. Abubaker Bagalana stated that Ms. Namasobo Zaituni from whom the bank obtained spousal consent and who was also confirmed as the wife to the Mortgagor resides at Busaana Road. The receipts adduced by the plaintiff to prove sustenance in relation to Plot 44 Nkokonjeru Road had quite a number of issues these included the fact that they were not for the said Joward Hotel which the plaintiff purports to manage but for Namasaba Zaituna Apartments. The receipts had quite a number of crossings in an effort to have them backdated as these were written in 2020 but the author had to cross 2020 to indicate 2017 in particular receipt numbers 199, 059 and 053 (collective exhibit D. Ex.6). The receipts were written on the same day for the reason that the same page cannot be used over a period of (7) seven years, maintaining the same consistency over years, pen pressure, style in that they are too consistent hence further justifying the fact that they were written on the same day.

[11] To this is coupled the plaintiff's untrue statement that all receipts would be issued on a particular Sunday after the plaintiff had received money from various persons/customers. This too does not make any logic. D.W.1 and the valuation

report make no mention of the said Joward Hotel and in fact D.W.1 confirms that neither was the plaintiff at any one time found at the suit premises managing the same. D.W.1 confirmed that the premises were being managed by Mr. Kadiri Wamukwe. The plaintiff has neither proved sustenance nor residence in relation to plot 44 though both must be proved. This issue be resolved in the negative with a finding that Plot 44 is neither family land nor a matrimonial home.

[12] The property in question is neither family land nor a matrimonial home, therefore the plaintiff's consent was not required. Failure by a mortgagee to obtain the proper spousal consent is not a strict liability offence. A Mortgagee who takes all reasonable steps to ensure that it obtains correct information in relation to the property and thus the requisite consent, will be protected in law and its interest as mortgagee upheld. The 1st defendant took all reasonable and prudent steps to discharge its duty and in fact exceeded what would be ordinarily expected. As such, its mortgage interest is protected in law and the plaintiff's remedy for her mortgagor husband's deceit, non-disclosure, concealment, or fraud is due only from the mortgagor himself, the 1st defendant's mortgage being valid and enforceable.

[13] The 1st defendant mortgagee took all reasonable steps and carried out a sufficient due diligence in that: a) it carried out a search on the property which revealed that it was registered to Mr. Wamukwe Kadiri (exhibit D. Ex.6 dated 22nd January, 2019); b) The 1st defendant's officials and its appointed valuation surveyors physically inspected the property on 19th January 2019 and even after disbursement of the loan monies. They discovered that the property was a "hotel/commercial property (accommodation and lodge) branded as Visitors' Inn developed with two blocks which are attached together, Block 1 having 5 levels and Block 2 having 4 levels all fully complete" (exhibit D. Ex.8 dated 28th January, 2019). The property was therefore clearly not a matrimonial home or residence of the mortgagor and any of his spouses. It was a pure commercial property.

[14] Additionally, the 1st defendant required and the Mortgagor did indeed execute a Statutory Declaration on oath in which he declared that he only had one spouse named "Zaituni Wamukwe Namasobo" with whom he contracted a marriage on 7th August, 2010. The 1st defendant even went ahead to obtain a copy of the marriage certificate between the mortgagor and the said "Zaituni Wamukwe Namasobo" (exhibit D. Ex.10 dated 10th July, 2019). Out of abundance of caution, the 1st Defendant went ahead to obtain the spousal consent of the said Zaituni Namasobo and her Spousal Consent (exhibit D. Ex.12).and National ID (exhibit D. Ex.13). This was so even though the property was clearly purely commercial and not an ordinary residence of the mortgagor or any spouse of his.

[15] It is clear that the 1st defendant carried out due diligence, acted prudently, cautiously and in good faith, and any shortcomings are only attributable to the plaintiff's spouse (the mortgagor) who not only breached his duty to the 1st defendant but also committed a criminal offence. Where a mortgagee carries out the due diligence required of it and it later turns out that the mortgagee was misled by the mortgagor or the mortgagor and his or her spouse, the innocent spouse's remedy if any lies with the mortgagor and not the mortgagee. The suit should be dismissed as aga8nst the 1st defendant.

<u>The final submissions of counsel for the 2nd defendant.</u>

[16] Counsel for the 2nd defendant submitted that the the 2nd defendant has no interest of whatsoever nature in the property comprised in LRV 2991 Folio 4 Plot 44 Nkokonjeru Court, Mbale and LRV 4421, Folio 22 Plot 28, Kumi Road, Mbale. None of the plaintiff's prayers relate to the 2nd defendant in any manner. It is the 2nd defendant's case that the plaint does not disclose any cause of action against it. A suit that was filed by the plaintiff with knowledge that the 2nd defendant did not have any interest in the property the subject of the same suit, cannot escape the conclusion that the same is frivolous and vexatious.

The decision;

[17] This suit arises from a dispute over the mortgaging of two properties without the alleged consent of one spouse. The plaintiff, who contracted a solemn Islamic marriage with Mr. Wamukwe Kadiri Gishu on or about 10th November 2013, contends that two properties, i.e. LRV 2991 Folio 4, Plot 44 at Nkokonjeru Court, Mbale (registered in her husband's name) and LRV 4421 Folio 22, Plot 80, Kumi Road, Mbale (registered in the name of their company, M/s WK's Hardware Limited), constituted matrimonial/family property from which the family derived sustenance through a hardware business, retail business, and hotel accommodation. She alleges that her husband mortgaged both properties to the defendants without her knowledge or consent, and that she only discovered the transaction around mid-November 2020. She seeks annulment of the mortgage for illegality, a permanent injunction restraining the defendants from further dealings with the properties, general and exemplary damages, interest and the costs of the suit.

[18] The 1st defendant contends that the property registered in the company's name did not require the plaintiff's consent, that it obtained spousal consent from a different wife (one Zaituni Namasobo) on 17th July 2019, and that it is a *bona fide* mortgagee who exercised due diligence. The 2nd defendant contends that both properties are commercial properties registered in the company's name and do not constitute family or matrimonial land, and further that it has no interest whatsoever in either property and the suit against it is frivolous and vexatious.

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First issue; whether the land comprised in LRV 2991 Folio 4 Plot 44 Nkokonjeru Port Road Mbale constitutes the plaintiff's family land.

Second issue if so, whether the spousal consent of Namasobo Zaituni was sufficient for this transaction.

[19] The crux of this case is whether the properties in question qualify as a matrimonial home (under the test of ordinary residence) or family land under the conjunctive test (ordinary residence and sustenance), which would trigger the mandatory spousal consent requirement, or whether they are purely commercial properties to which the consent regime does not apply. Under section 4 (1) of *The Mortgage Act*, a mortgage of a matrimonial home is only valid if the document or form used in applying for or granting the mortgage is signed by or there is evidence from the document that it has been assented to by the mortgagor and the spouse or spouses of the mortgagor living in that matrimonial home.

[20] The moment a property is factually occupied as a matrimonial home, spousal consent is strictly mandatory (see *Global Capital Save (2004) Ltd and another v. Alice Okiror and another, S.C. Civil Appeal 11 of 2021*; *Sheila Butsya Lubega v. Percy Paul Lubega and another, H.C. Civil Suit No. 222 of 2016* and *Nalweyiso v. Kalule and three others H.C. Civil Suit No. 419 of 2016*). Section 5 of the Act requires a mortgagee to satisfy himself or herself that the consent of a spouse is an informed and genuine consent. A mortgage will be null and void where the lender fails to verify spousal consent for the matrimonial home (see *Godfrey Kalule v. Pearl Bank Uganda Limited and others H.C. Misc. Cause No. 122 of 2025*).

[21] On the other hand, under section 39 (4) of *The Land Act*, “family land” is defined as land: (a) on which is situated the ordinary residence of a family; (b) on which is situated the ordinary residence of the family and from which the family derives sustenance; (c) which the family freely and voluntarily agrees should be treated as family land; or (d) which is treated as family land according to the norms, culture, customs, traditions or religion of the family. These four distinct paragraphs operate disjunctively: paragraph (a) protects land used solely as the family’s ordinary residence, paragraph (b) protects dual-purpose land (residence plus sustenance), and paragraphs (c) and (d) protect land designated by voluntary family agreement or cultural/customary/religious norms, independent of actual residence or sustenance.

[22] The test under section 39 (4) (b) is mandatorily conjunctive; the property must be both the family's ordinary residence and a source of sustenance (see *Christine Hope Kanyima v. Mercantile Credit Bank Limited and another, H.C Misc. Application No. 85 of 2021* and *Damalie Byakusaaga Bisobye v. Byakusaaga Bisobye Sebulime Bikoso and another, H.C. Misc. Application No. 1295 of 2023*). Lack of written spousal consent renders a mortgage over family land void (see *Global Capital Save (2004) Ltd and another v. Alice Okiror and another, S.C. Civil Appeal 11 of 2021* and *Laila Lubega v. Ali Lubega and another, H.C. Civil Suit No. 118 of 2010*). The question is whether the conjunctive test of ordinary residence and derivation of sustenance was met for LRV 2991 Folio 4, Plot 44 at Nkokonjeru Court, Mbale.

[23] P.W.1 Ms. Namasaba Zaituna testified that since her marriage to Mr. Wamukwe Kadiri Gishu on 10th November, 2013 she has been in possession of and use of all properties comprised in LRV 2991 Folio 4 Plot 44 Nkokonjeru Court, Mbale and LRV 4421, Folio 22 Plot 28, Kumi Road, Mbale. She has at all material time been in the day to day management of the hotel and rentals at Plot 44 under the name and style of "Namasaba Apartments." There is a Hotel, "Joward Restaurant" which is a registered business name for a tenant. She and her children collect rent from the guest house and tenants for family and survival, with receipts to prove the rental collection (collective exhibit P. Ex.6). She considers it to be family property because the receipts are in her names. She also participated in the day to day management of the hardware business undertaken at Plot 80 by checking and verifying receipts before goods are taken by the customer. She has property at Lugard Road, Industrial Division where she resides and also has tenants there.

[24] D.W.1 Mr. Abubaker Bagalana testified that before advancing a loan to the Mr. Wamukwe Kadiri Gishu, the 1st defendant engaged a valuer in whose reports dated 28th January, 2019 indicating that both titles comprised commercial property with Plot 44 housing a hotel/guesthouse; it is a commercial property with a restaurant and guest house called "Visitor's inn," while Plot 80 accommodated a hardware

shop. One of the Managers in the Restaurant told the witness that the property was managed by Haji Wamukwe Kadiri, and the latter confirmed that to be the case. The plaintiff was not on the property.

[25] At the hotel they found that the wife was Namasobo Zaitun and she is the one from whom the consent was obtained. They were told she was resident at Busano Road along Mbale-Tororo Road. Maluku is along the road to Kampala. During the valuation visit, they found some gentlemen and one was moving with the valuation team through the rooms. They established that the business belonged to Mr. Wamukwe Kadhiri. He was welcomed by the people the valuation team found at the property. Mr. Wamukwe gave instructions to one of the staff to bring the keys and the valuation team moved though the rooms. Mr. Wamukwe went behind the counter accessed through controls and that showed me he was the boss. No one opposed the process. The name of the Hotel was "Visitors' Inn." No one resided on the property.

i. Whether any of the two properties is a matrimonial home.

[26] A matrimonial home requires a building where husband and wife ordinarily reside together. P.W.1 herself admitted that she resided at Lugard Road, not at Plot 44. She confirmed this in her witness statement and testimony. Since P.W.1 resides at Lugard Road and D.W.1 confirms no one resides at Plot 44, it cannot qualify as a matrimonial home. Plot 44 does not qualify as a matrimonial home. The plaintiff does not ordinarily reside there. The property is, by the plaintiff's own admission and the valuation evidence, a commercial property housing a hotel. The property does not meet the definition of a matrimonial home under section 2 of *The Mortgage Act*.

[27] D.W.1 testified that the valuation report indicated Plot 80 accommodated a hardware shop. The property is registered in the name of M/s WK's Hardware Limited (a company). P.W.1 testified that she participated in the day-to-day

management of the hardware business at Plot 80 by checking and verifying receipts before goods were taken by customers. Section 2 of *The Mortgage Act* defines “matrimonial home” as: a building or part of a building in which a husband and wife or, as the case may be, wives, and their children, if any, ordinarily reside together...” This definition is inherently tied to the concept of marriage between individuals; a company cannot marry, cannot have a “spouse,” and cannot “ordinarily reside” in a building. The definition presupposes an individual mortgagor who is married. The plaintiff did not claim to reside at Plot 80. There is no evidence that the family ordinarily resided at Plot 80. P.W.1 only claimed to assist in managing the hardware business there. She resided at Lugard Road.

ii. Whether any of the two properties is family land.

[28] The definition of “family land” is functional; it focuses on the use of the land (ordinary residence, sustenance, family agreement, customary treatment) rather than the identity of the registered owner. The Act does not explicitly state whether it applies only to individually-owned land or also to company-registered land. P.W.1 herself admitted that she resided at Lugard Road, not at Plot 44. She confirmed this in her witness statement and testimony. D.W.1 confirmed no one resided on the property; it is a commercial hotel. The valuation report describes it as a hotel/commercial property.

[29] There is no evidence the family ordinarily resided at Plot 44 with any degree of continuity or settled intent to make it their home. This category is not satisfied. Since ordinary residence is not established, the conjunctive test necessarily fails, regardless of whether sustenance is proven. Even if the family derived income from Plot 44, the absence of ordinary residence is fatal to this category. There is no evidence that the family freely and voluntarily agreed to treat Plot 44 as family land. The plaintiff does not make this claim. There is no evidence that Plot 44 is treated as family land according to the family’s norms, culture, customs, traditions, or religion.

[30] Even if the sustenance element were considered independently, there are serious evidentiary problems with the plaintiff's proof. The receipts (exhibits D. Ex.6) were for "Namasaba Zaituna Apartments," not for "Joward Hotel" which the plaintiff claims to manage. The receipts showed crossings suggesting backdating from 2020 to 2017 (particularly receipt numbers 199, 059, and 053). The receipts appeared to have been written on the same day, given their consistency in pen pressure, style, and formatting. The plaintiff's claim that all receipts were issued on particular Sundays lacks logical coherence. D.W.1 confirmed the plaintiff was never found at the suit premises managing the property, and that the property was managed by Mr. Wamukwe Kadiri. None of the four categories of family land under section 39 (4) of *The Land Act* are satisfied.

iii. Whether the consent given by Namasobo Zaituni was sufficient for this transaction.

[31] The practical requirements for granting security over land confirm a clear bifurcation between individual and corporate mortgagors. According to Latham & Watkins, *Taking Security in Africa: A Comparative Guide for Investors*, the guide on taking security in Uganda, states as follows:

> For married individuals providing security over the matrimonial home, "a declaration from the applicant must be provided stating whether they are married. If so, a copy of the marriage certificate must also be provided to the secured party. In addition, evidence of spousal consent must be provided to the Land Registry."
>
> For companies, "a copy of the company resolutions authorising the charge" must be provided to the Lands Registry. "Companies are, however, obliged under *The Companies Act* to keep a register of all charges created over its assets."

[32] This distinction reflects a fundamental principle: the spousal consent regime is triggered by the status of the grantor as a married individual providing security over

a matrimonial home or family land. For companies, the authorisation mechanism is corporate resolution, not spousal consent. The spousal consent provisions in both *The Land Act* and *The Mortgage Act* are drafted in terms of individuals who are married. Section 40 of *The Land Act* refers to "his or her spouse," language applicable to natural persons, not corporate entities. Section 2 of *The Mortgage Act* defines "matrimonial home" as a building where "a husband and wife... ordinarily reside together," a company cannot have a matrimonial home. Section 5 of *The Mortgage Act* requires the mortgagee to satisfy itself that "the consent of a spouse" is obtained; a company has no spouse. The regime is personal to married individuals, not corporate entities.

[33] Plot 80 is registered in the name of M/s WK's Hardware Limited. *The Land Act*'s definition of "family land" in section 39 (4) focuses on the functional use of the land, not the identity of the registered owner. Theoretically, if land registered in a company's name serves as the ordinary residence of a family and/or is the source of their sustenance, it could be argued that the land qualifies as family land regardless of the corporate registration. However, this argument faces several obstacles: the consent requirement in section 40 still requires consent from "his or her spouse," if the registered proprietor is a company, whose spouse's consent is required? The company cannot give spousal consent because it has no spouse.

[34] *The Mortgage Act*'s definition of "matrimonial home" is inherently tied to marriage between individuals, and a company-owned building cannot be a "matrimonial home" in the statutory sense. The practical requirements for mortgaging company property (company resolution, not spousal consent) confirm that the regime does not contemplate corporate mortgagors. If a spouse seeks to challenge a mortgage over company-owned property on the basis that the company is merely an *alter ego* of the other spouse, the corporate veil doctrine provides a potential pathway. If the court finds that: the company is a sham or façade used to evade the spousal consent requirement; there is such unity between the company and the controlling spouse that the separateness of the corporation has ceased (the *alter ego* test);

and the company has no independent business apart from the controlling spouse's personal affairs, then the court could theoretically disregard the corporate form and treat the property as the individual spouse's personal asset, triggering the spousal consent regime.

[35] However, the threshold for piercing the corporate veil is high. As established in case law, fraud or sham must be strictly proved, and blanket requests to pierce the veil fail without specific evidence. The Court will not pierce the veil simply because one spouse controls the company; there must be evidence that the company was used as a cloak to perpetrate fraud or evade legal obligations.

[36] In the instant case, several factors weigh against extending the spousal consent regime to Plot 80. (i) the property is commercial: Plot 80 houses a hardware shop. It is not the family's ordinary residence. It does not qualify as family land under any of the four categories in section 39 (4), as established in the analysis above; (ii) the property is registered in a company name: M/s WK's Hardware Limited is a separate legal entity. The mortgage was executed by the company through its authorised signatories, with company resolutions, the proper mechanism for corporate mortgaging; (iii) no evidence of sham or fraud in the corporate structure was specifically pleaded or proven.

[37] The plaintiff alleges that the property was transferred into the company's name "without her consent," but there is no evidence that the company was created as a sham to evade spousal consent requirements. The company appears to have a legitimate business purpose, operating a hardware business; (iv) even if the veil were pierced, the property would still need to qualify as family land under section 39 (4) of *The Land Act*. Since the property is a commercial hardware shop where the family does not reside, it would not meet the ordinary residence requirement. Even under the sustenance prong, the plaintiff's evidence of participation in the business (checking receipts) is insufficient to establish that the property is the family's "principal place which provides the livelihood of the family" as required by

the statutory definition. Lastly, (v) the 1st defendant conducted due diligence appropriate for a corporate mortgagor; it required and obtained company resolutions, conducted a land search, and physically inspected the property. The requirements for corporate mortgaging were satisfied.

[38] The spousal consent regime under *The Land Act* and *The Mortgage Act* does not, as a matter of statutory text and legal practice, extend to properties registered in the name of a corporate entity. The regime is personal to married individuals; it requires consent from "his or her spouse," and the concept of a "matrimonial home" presupposes a marriage between natural persons. Companies are subject to a different authorisation regime under *The Companies Act* (board resolutions, shareholder resolutions, and registration of charges). On the other hand, the spousal consent regime does not automatically apply to all land owned by a married person. It applies only where the land has first been established as "family land" under sections 39 (4) of *The Land Act* or as a "matrimonial home" under section 2 of *The Mortgage Act*. The question, therefore, is not whether the plaintiff is married (which is undisputed), but whether Plot 44 qualifies as family land or a matrimonial home. If it does not, the consent regime is simply inapplicable, regardless of the plaintiff's marital status.

[39] The plaintiff's primary reliance is on the claim that she and her family derive sustenance from Plot 44 through the hotel and rental income. Even if this claim were accepted (which is challenged on evidentiary grounds), it would be insufficient to trigger the consent regime because under section 39 (4) (b), sustenance alone, without ordinary residence, does not qualify the land as family land. The test is conjunctive. Under section 39 (4) (a), ordinary residence alone (without sustenance) is sufficient, but sustenance alone (without ordinary residence) is not, because there is no category that requires sustenance alone. The valuation report (exhibit D. Ex.8) describes Plot 44 as a hotel/commercial property, a multi-storey accommodation and lodge facility. The property is not a residence. Plot 44, a hotel where no one resides, does not fit this paradigm.

[40] The spousal consent regime under *The Land Act* and *The Mortgage Act* does not extend to the land comprised in LRV 2991 Folio 4 Plot 44, Nkokonjeru Court, Mbale. The regime applies only where land has been established as family land or as a matrimonial home. Plot 44 fails to qualify under any of the four categories of family land. It is not the ordinary residence of the family (the plaintiff resides at Lugard Road). It is not the ordinary residence and a source of sustenance (no ordinary residence; sustenance unproven and evidentially challenged). There is no evidence of a voluntary family agreement to treat it as family land. There is no evidence of customary or religious treatment as family land.

[41] It also does not qualify as a matrimonial home because the husband and wife do not "ordinarily reside together" there. On this basis, since Plot 44 is neither family land nor a matrimonial home, the plaintiff's consent was not required for its mortgaging, and the absence of her consent does not render the mortgage void. The plaintiff's spousal consent was not required for the mortgaging of either property, and the consent regime under sections 39 and 40 of *The Land Act.* In conclusion, the Court therefore resolves these two issue in the negative; the land comprised in LRV 2991 Folio 4 Plot 44 Nkokonjeru Port Road Mbale is not the plaintiff's family land, and the spousal consent of Namasobo Zaituni was unnecessary for this transaction.

Third issue: whether the 1st defendant exercised due diligence in obtaining the spousal consent.

[42] *The Mortgage Act* imposes a two-part duty on a mortgagee: section 5 (2) (a): an intending mortgagee "shall take reasonable steps to ascertain whether an intending mortgagor is married and whether or not the property to be mortgaged is a matrimonial home." Section 5 (2) (b): an intending mortgagor "shall make full disclosure to the intending mortgagee as to his or her marital status and whether or not the property to be mortgaged comprises the matrimonial home." The mortgagee is deemed to have discharged the duty under subsection (2), if the

mortgagee obtains a marriage certificate issued in accordance with the laws of Uganda, and in the absence of it, a statutory declaration from the spouse or spouses of the mortgagor as proof of marriage (see section 5 (3) of the Act).

[43] Regulation 3 of *The Mortgage Regulations, 2012* prescribes the specific procedural steps: Regulation 3 (1): a mortgagee "shall require the applicant to state whether he or she is married" and make a statutory declaration; Regulation 3 (2): where the applicant states he or she is married, "the spouse of that person shall also make a statutory declaration"; Regulation 3 (3): the applicant shall "attach a certified copy of the marriage certificate or any other evidence of the marriage to the declaration."

[44] The onus of ascertaining the spousal status of an intending mortgagor "is on the mortgagee, carrying an inferred duty of due diligence" and that "spousal consent is a condition precedent to formation of the contract and goes to the root of a mortgage, whether legal or equitable" (see *Global Capital Save (2004) Ltd v. Alice Okiror, S.C. Civil Appeal No. 11 of 2022*). Whereas section 5 (2) (a) of the Act requires an intending mortgagee to take "reasonable steps" to ascertain whether an intending mortgagor is married, the reasonable steps are not defined and therefore the test is what a reasonable man would have done in the circumstances. The duty to find out whether the intended mortgagor is married ideally extends to visiting the mortgagor's home and neighbourhood to inquire into the marital status of the mortgagor. It also involves inquiries from local leaders (LC leaders) on the marital status in the village where the mortgagor resides.

[45] The evidence on record shows that the 1st defendant took the following steps: (i) it conducted a search on the property, which revealed that Plot 44 was registered in the name of Mr. Wamukwe Kadiri (exhibit D. Ex.6, dated 22nd January, 2019). This established the registered proprietor and confirmed the title; (ii) its officials and its appointed valuation surveyors physically inspected the property on 19th January, 2019. The valuation report (exhibit D. Ex.8, dated 28th January, 2019) described

the property as “a hotel/commercial property (accommodation and lodge) branded as Visitors’ Inn developed with two blocks which are attached together, Block 1 having 5 levels and Block 2 having 4 levels all fully complete.” Its officials and its appointed valuation surveyors physically inspected the property on 19th January, 2019. The valuation report (exhibit D. Ex.8, dated 28th January, 2019) described the property as “a hotel/commercial property (accommodation and lodge) branded as “Visitors’ Inn” developed with two blocks which are attached together, Block 1 having 5 levels and Block 2 having 4 levels all fully complete.”

[46] During the inspection, D.W.1 testified that: one of the managers at the restaurant told the valuation team the property was managed by Haji Wamukwe Kadiri, which the latter confirmed. The plaintiff was not found on the property. No one resided on the property. Mr. Wamukwe demonstrated control over the premises, giving instructions to staff, accessing keys, and moving behind the counter. The hotel was called “Visitors’ Inn” not “Joward Restaurant” or “Namasaba Apartments” as claimed by the plaintiff. This physical inspection was critical because it confirmed that the property was commercial in nature, not a matrimonial home or family residence.

[47] Furthermore, the 1st defendant required the mortgagor to execute a Statutory Declaration in which he declared that he had only one spouse named “Zaituni Wamukwe Namasobo” with whom he contracted a marriage on 7th August, 2010. This complied with Regulation 3 (1) of *The Mortgage Regulations*. The 1st defendant obtained a copy of the marriage certificate between the mortgagor and the said “Zaituni Wamukwe Namasobo” (exhibit D. Ex.10, dated 10th July, 2019). This complied with Regulation 3 (3) of *The Mortgage Regulations* and section 5 (3) of *The Mortgage Act*. Out of abundance of caution, even though the property was clearly commercial and not a matrimonial home, the 1st defendant obtained the spousal consent of Zaituni Namasobo (exhibit D. Ex.12). The 1st defendant obtained the National ID of the consenting spouse (exhibit D. Ex.13), verifying her

identity. D.W.1 testified that the 1st defendant's officials visited the property even after disbursement of the loan monies, indicating ongoing monitoring.

[48] The physical inspection of the property by the valuation team was a crucial element of the 1st defendant's due diligence. It served two purposes. It ascertained the nature of the property: The valuation report confirmed the property was a commercial hotel, not a matrimonial home or family residence. This directly addressed the section 5 (2) (a) requirement to ascertain "whether or not the property to be mortgaged is a matrimonial home." It provided an opportunity to identify occupants: during the visit, the valuation team interacted with people on the property, including managers and staff. They identified the wife as "Namasobo Zaitun," from whom consent was subsequently obtained. They were told she resided at Busano Road, not at the property. The plaintiff was not found on the property.

[49] The central difficulty in the plaintiff's case is that her husband, the mortgagor, actively concealed her existence. The mortgagor, executed a statutory declaration on oath declaring only one spouse, presented a marriage certificate with Zaituni Namasobo, dated 7th August. 2010 and did not disclose his Islamic marriage to the plaintiff on 10th November, 2013. This constitutes fraud, deceit, and misrepresentation by the mortgagor, the very conduct contemplated by section 5 (2) (b) of *The Mortgage Act*, which places a duty of full disclosure on the mortgagor. The plaintiff's marriage was conducted under Islamic law on 10th November, 2013. The mortgagor declared only one spouse (Zaituni Namasobo, married 7th August, 2010) and produced a marriage certificate.

[50] The 1st defendant had no reason to suspect the existence of a second marriage, particularly one contracted under Islamic law that might not have been registered in the same manner. The 1st defendant cannot be faulted for not discovering a marriage that the mortgagor actively concealed and for which no public record may have existed. Under section 33 of the Act, "where a mortgage has been obtained

(a) through fraud, deceit, or misrepresentation by the mortgagor... the Court may review the mortgage on application by the persons mentioned in section 34 in the interest of justice."

[51] However, section 34 (1) (c) permits a spouse of the mortgagor to apply for such review. The question is whether, given the 1st defendant's extensive due diligence, the mortgage should be voided because of the mortgagor's fraud. A mortgage will not be voided where the false representation made by the mortgagor to secure the mortgage is immaterial to the transaction. The mortgagor's concealment of the plaintiff's existence, while fraudulent, is immaterial to the validity of the mortgage because the consent regime was never triggered. The fraud, such as it is, does not inform the execution of the transaction or affect the ultimate outcome. Having found that the property was neither family land nor matrimonial property at the time it was mortgaged, the fraudulent spousal consent was inconsequential fraud that cannot justify cancellation of the mortgage. The 1st defendant's mortgage interest over Plot 44 is therefore not impaired by the plaintiff's lack of consent.

[52] In conclusion, the 1st defendant took all reasonable and prudent steps to discharge its duty and in fact exceeded what would be ordinarily expected. Any shortcomings are attributable solely to the mortgagor's fraud, deceit, non-disclosure, and concealment, not to any failure of due diligence by the 1st defendant. This issue is accordingly answered in the affirmative; the 1st defendant exercised due diligence in obtaining the spousal consent. Even though the property was clearly commercial and the spousal consent regime did not strictly apply (as neither property qualified as family land or a matrimonial home), the 1st defendant went beyond what was legally required by obtaining spousal consent from the declared spouse. The 1st defendant exceeded what would be ordinarily expected. The 1st defendant's conduct demonstrates a conservative and prudent approach to risk management. The plaintiff's remedy, if any, lies against her husband, the mortgagor, who committed the fraud, and not against the 1st defendant whose mortgage is valid and enforceable.

Fourth issue: whether the plaintiff is entitled to the remedies sought.

[53] The plaintiff sought annulment of the mortgage for illegality, a permanent injunction restraining the defendants from further dealings with the properties, general and exemplary damages, interest and the costs of the suit.

Final Orders;

[54] The plaintiff not having established a valid legal or equitable right to be protected, the suit is accordingly dismissed with costs to the defendants.

Delivered electronically this 21st day of November, 2026. …Stephen Mubiru…

Stephen Mubiru
Judge,
21st November, 2026

Appearances;

For the plaintiff : M/s Masanga & Co. Advocates.
For the 1st defendant : M/s. MMAKS Advocates.
For the 2nd defendant : M/s Arcadia Advocates.