

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
ORIGINATING SUMMONS NO. 5 OF 2020
LETSHEGO UGANDA LIMITED ::::::::::::::::::::::::::::::::::: PLAINTIFF
VERSUS
FELIX KULAYIGYE ::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. JUSTICE BONIFACE WAMALA

JUDGMENT

Introduction

[1] The Plaintiff brought this suit against the Defendant by way of Originating Summons for determination of the following questions: -

1. Whether the Plaintiff is entitled to foreclose and sell the mortgaged property of the mortgagor to recover all the sum of money due in respect of the principal debt, interest and other incidental charges?
2. Whether the Plaintiff is entitled to sell the said mortgaged property by private treaty or public auction to recover the entire sum due to it together with costs and expenses related thereto?
3. Whether the Plaintiff is entitled to costs of this suit?

[2] The originating summons was supported by the affidavit of **Fidel Atwijukire**, a Branch Manager at the Kisozi Branch in the Plaintiff company, which affidavit contained the grounds of the application. In the affidavit, the deponent states that the Defendant approached the Plaintiff company for two loan facilities, one of UGX 100,000,000/= and another of UGX 60,000,000/=: both payable within 03 (three) months at an interest rate of 2.15%. The amount repayable under the first loan was UGX 111,021,917.81/= and UGX

66,613,150.68/= under the second loan. The two loan facilities were accordingly availed to the Defendant on 30th November 2018 and a loan agreement was executed between the parties for each facility respectively. Both facilities were guaranteed by a one Ntabazi Fred. The facilities were also secured by a legal mortgage on land comprised in Block 327 Plot 243 situate at Nakitoloko, Busiro, Ssabagabo, Wakiso District registered in the name of the Defendant whereupon a mortgage deed was executed between the parties. The Defendant, however, did not pay the said monies within the stipulated time and as at 30th June 2020, the outstanding balance was UGX 96,061,917.81/= on the first loan and UGX 66,963,150.68/= on the second loan; totaling to UGX 163,025,068.49/=.

[3] The deponent further stated that following failure by the Defendant to pay up the facilities as agreed, the Plaintiff issued the Defendant with Notices of Default which were acknowledged by the Defendant but were ignored. Upon expiry of the required statutory period without the Defendant remedying the default, the Plaintiff issued the Defendant with Notices of Sale of the mortgaged property. Upon the said Notices being ignored by the Defendant, the Plaintiff advertised the property in the Daily Monitor on 22nd August 2019 for sale in accordance with the Mortgage Act. It was averred by the deponent that after advertisement of the property, the Defendant blocked the Plaintiff's agents from accessing the property which prompted the Plaintiff to issue the Defendant with a Notice of Intention to enter into possession of the mortgaged property on 15th October 2019. On 21st October 2019, in response to the above said Notice, the Defendant wrote a letter requesting the Plaintiff to afford him time until the 26th of October 2019 to be able to put his affairs in order and fulfill his loan obligations; to which the Plaintiff agreed. However, the Defendant has since then not paid up the said outstanding amount and has continued denying the Plaintiff access to the property, thus this suit.

[4] The Defendant did not file a reply to the suit despite evidence of service of process having been effectively done upon the Defendant. The affidavit of service on record indicates that on 9th September 2020, the Plaintiff was personally served with the Originating Summons to which he appended his signature. Counsel for the Plaintiff, therefore, prayed for the Court to proceed with the hearing of the matter ex parte under Order 9 Rule 10 of the CPR, which order was granted by the Court.

[5] At the hearing, the Plaintiff was represented by Mr. Kishari Paul. As stated above, it was an ex parte hearing. Counsel requested to make and file written submissions which the Court allowed. The submissions were duly filed and I have reviewed and taken them into consideration in the course of resolution of the issues before the Court. The issues for determination have been framed along the questions raised in the Originating Summons and will be resolved accordingly.

Resolution by the Court

Issue 1: Whether the Plaintiff is entitled to foreclose and sell the mortgaged property of the mortgagor to recover all the sum of money due in respect of the principal debt, interest and other incidental charges?

[6] I have considered the evidence adduced by the Plaintiff and the submissions of Counsel for the Plaintiff on this question. *Order 37 Rule 4 of the CPR* upon which this application was based provides as follows: –

“Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before a judge in chambers, for such relief of the nature or kind following as

may be by the summons specified, and as the circumstances of the case may require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance or delivery of possession by the mortgagee.”

[7] It is clear from the above provision that the Plaintiff herein, as a mortgagee, would be entitled to take out as of course an originating summons for a relief such as sale or foreclosure so as to recover any monies due under a mortgage. The first question, therefore, on the case before me is whether a mortgage agreement existed between the parties herein. Under *Section 3 (1) of the Mortgage Act No. 8 of 2009*, a person holding land under any form of land tenure, may, by an instrument in the prescribed form, mortgage his or her interest in the land or a part of it to secure the payment of an existing or a future or a contingent debt or other money or money’s worth or the fulfilment of a condition. Under *Section 3 (4) of the Mortgage Act*, a mortgage created under subsection (1) shall only take effect when registered.

[8] The uncontested evidence before the Court as adduced in the affidavit in support of the originating summons shows that the Defendant applied for and obtained two loan facilities from the Plaintiff. As security for the loan facilities, the parties executed a legal mortgage on land comprised in Block 327 Plot 243 situate at Nakitoloko, Busiro, Ssabagabo, Wakiso District registered in the name of the Defendant (hereinafter referred to as **“the suit land/property”**). The mortgage was duly registered and entered on the certificate of title of the suit property. This is sufficient evidence to establish that a mortgage agreement existed between the parties herein.

[9] The next question is whether the Plaintiff, as mortgagee, is entitled to sell the mortgaged property to recover the outstanding monies in respect of the principal debt, interest and other incidental charges. The evidence by the

Plaintiff vide the affidavit in support of the originating summons is that the Defendant failed to pay back the monies as agreed whereupon the Plaintiff took all necessary procedural steps to achieve recovery but to no avail. The Defendant was accordingly served with a notice of default dated 18th April 2019, which is shown to have been received by the Defendant on the same date. The notice was served in accordance with the provisions of Section 19 of the Mortgage Act. The Defendant neither responded to the notice nor effected any payment.

[10] Under Section 20 (e) of the Mortgage Act, upon such default by the Defendant, the Plaintiff is entitled to an order of sale of the mortgaged property so as to recover the outstanding sum under the mortgage. According to the evidence, the outstanding sum is UGX 158,026,000/= according to Annexure “Q” on the affidavit in support which is a letter communicating the outstanding sum as of 22nd October 2019. Annexure “Q” was in response to the Defendant’s letter dated 21st October 2019 in which the Defendant was asking for more time within which to comply with his obligations and further seeking particulars of the outstanding amounts. It was upon failure by the Defendant to make payment of the said outstanding sum and denial of access to the Plaintiff to the suit property that the Plaintiff brought this suit.

[11] The evidence by the Plaintiff establishes on a balance of probabilities that they are entitled to recover the sum of UGX 158,026,000/= by way of sale of the mortgaged property. Consequently, the Plaintiff shall be entitled to an order of vacant possession in order to enable them execute the sale in accordance with the law. The Plaintiff is also entitled to interest from the date of default. I have proceeded under the assumption that by 22nd October 2019 when the Plaintiff communicated the outstanding sum of UGX 158,026,000/=: all the interest accrued up to the said date had been taken into consideration; or if not, the Plaintiff had opted to forfeit the same. I will therefore award interest to

the Plaintiff at the agreed rate from the 22nd October 2019 till payment in full. The agreed rate, according to the loan offer letter and the Mortgage Deed (Annextures “C” and “H” respectively to the affidavit in support), was 2.15% per month; which translates to 25.8% per annum. Interest shall, therefore, be awarded to the Plaintiff at the said rate, since it was agreed upon and is within the range of a reasonable commercial rate. The first issue is therefore answered in the affirmative.

Issue 2: Whether the Plaintiff is entitled to sell the said mortgaged property by private treaty or public auction to recover the entire sum due to it together with costs and expenses related thereto?

[12] Counsel for the Plaintiff relied on *Section 28(1)(d) of the Mortgage Act* which is to the effect that where the mortgagee becomes entitled to exercise the power of sale, the sale may be made by public auction unless the mortgagor consents to a sale by private treaty. Counsel submitted that the mortgagor had in paragraph I of the Mortgage Deed consented to the sale of the mortgaged property by private treaty in the event of default and, as such, the court should order that the sale of the mortgaged property be by way of private treaty.

[13] Under *Section 26 of the Mortgage Act*, the mortgagee who has complied with Section 19 of the Act (service of notice of default), may exercise his/her power of sale of the mortgaged property upon service of a notice to sell in the prescribed form on the mortgagor and shall not proceed to complete any contract for the sale of the mortgaged land until twenty-one working days have lapsed from the date of the service of the notice to sale. Under *Section 27 (1) of the Mortgage Act*, a mortgagee who exercises a power to sell the mortgaged land, including the exercise of the power to sell under an order of a court, owes a duty of care to the mortgagor, among others, to take all reasonable steps to obtain the best price as prescribed in the regulations.

[14] Under *Section 28(1) (d) of the Mortgage Act*, where a mortgagee becomes entitled to exercise the power of sale, that sale may be by public auction, unless the mortgagor consents to a sale by private treaty. *Regulation 8(1) of the Mortgage Regulations S.I No. 2 of 2012* also provides that a mortgagee exercising a power of sale under the Act shall subject to the Act and these Regulations, sell the mortgaged property by public auction. *Regulation 9 of the Regulations* provides that where the court makes an order for sale of mortgaged property, the sale shall be conducted in the manner directed by court. *Regulation 10* makes provision for consent by the mortgagor to a sale by private treaty. It provides as follows:

“Sale by private treaty

- (1) A mortgagee exercising a power of sale under the Act may, with the consent of the mortgagor, sell the mortgaged property by private treaty.*
- (2) For purposes of sub-regulation (1) consent of the mortgagor shall, subject to section 26 of the Act, be by written notice.*
- (3) For the avoidance of doubt, a mortgagor’s consent shall not be retrospective.”*

[15] It was shown by the Plaintiff that after the failure by the Defendant to respond to the notice of default, the Plaintiff issued notices of sale in respect of each loan facility respectively dated 15th July 2019. This was in compliance with Section 26 of the Mortgage Act. The Plaintiff has, therefore, established that they are entitled to sale of the mortgaged property either by public auction or by private treaty. It was argued for the Plaintiff that since the Defendant had in the Mortgage Deed consented to sale by private treaty in case of default on payment, the Plaintiff is entitled to conduct the sale by private treaty. However, looking at the provisions under *Regulation 10 of the Mortgage Regulations*, as laid out above, it appears to me that the consent has to be specifically given by

notice issued by the mortgagor and the same must not be retrospective. This means that the consent shall not have been made or given prior to the time of sale. Consent expressed by the mortgagor at the time of executing the mortgage agreement is definitely retrospective and is outlawed by the provision under Regulation 10 (3) cited above.

[16] As such, the said consent expressed in the mortgage deed cannot be relied upon by the Court to permit a sale by private treaty. I will therefore order that the sale shall be conducted by public auction in accordance with the provisions of Sections 27 and 28 of the Mortgage Act and Regulations 8 and 9 of the Mortgage Regulations; which provisions shall be strictly adhered to.

Issue 3: Whether the Plaintiff is entitled to costs of this suit?

[17] Under *Section 27 of the Civil Procedure Act*, costs of a suit follow the event and a successful party is entitled to costs unless, for good cause, the court orders otherwise. In the instant case, there is no reason as to why the Plaintiff should not be awarded costs. I accordingly make an order of costs for the Plaintiff against the Defendant.

Decision of the Court

[18] In all therefore, the suit by the Plaintiff succeeds. I accordingly enter judgment for the Plaintiff against the Defendant with the following orders: -

1. The Plaintiff is permitted to exercise their power of sale over the mortgaged property comprised in Block 327 Plot 243 situate at Nakitoloko, Busiro, Ssabagabo, Wakiso District so as to recover the outstanding sum of UGX 158,026,000/= under the mortgage executed between the Plaintiff and the Defendant.
2. The Plaintiff is granted an order of vacant possession of the suit land in order to execute the sale in accordance with the law.

3. The sale shall be by public auction in accordance with the provisions of the Mortgage Act and the Regulations.
4. The outstanding sum in (1) above shall attract interest at the rate of 25.8% p.a. from the date of the last notice (22nd October 2019) till full recovery of the principal sum.
5. The costs of the suit are awarded to the Plaintiff against the Defendant.

It is so ordered.

Signed, dated and delivered by email this 1st day of November, 2021.



Boniface Wamala

JUDGE