IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

COMMERCIAL DIVISION

Reportable
Civil Suit No. 0013 OF 2022 (OS)

In the matter between

STANBIC BANK UGANDA LIMITED **PLAINTIFF**

And

1. MUNWE ENTERPRISES LIMITED

2. JONATHAN KATENDE **DEFENDANTS**

Heard: 10 March, 2023
Delivered: 03 January, 2024

Civil Procedure — *Originating summons — The practice of originating summons is to enable simple matters to be settled by the Court without the expense of bringing a suit in the usual way. — where there is no question of construction the procedure by originating summons is inappropriate.*

Contract Law — *Accord and satisfaction agreements – The consideration for an accord is often the resolution of a disputed claim. — The compromise of a dispute between parties will serve as consideration for an accord and satisfaction when the dispute is bona fide. — There must be new consideration independent of the original consideration, something the debtor has no legal obligation to do, or a refrain from doing something the debtor has a legal right to do, to support an accord and satisfaction.*

Mortgages — *Right of redemption — Giving ineffective or inadequate notice to rectify, of default or of sale would have such an effect due to the resultant denial of a fair opportunity to the mortgagee to redeem the property — It is trite that a mortgagee may not act toward the mortgagor, in an oppressive, harsh, unjustly burdensome, unconscionable, manner, or in breach of reasonable standards of commercial practice. — Courts therefore have an*

inherent power in equity to intervene, exceptionally, if the terms of the loan are oppressive or the lender has acted in an oppressive way.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] On 7th October, 2016, the 1st defendant applied for and was granted a credit facility in the sum of shs. 370,000,000/= to enable it issue bonds; an advance payment guarantee and other guarantees. The 1st defendant was in addition extended an overdraft facility to the limit of shs. 50,000,000/= to support the 1st defendant's short-term working capital requirements. Under the offer letter, it was agreed that the facilities would attract an interest rate of 26% per annum which would accrue on the daily outstanding balances. It was also agreed that a default interest of 2% per month would be charged in the event that the overdraft facility went into excess over the agreed limit. To secure repayment of those credit facilities, the 2nd defendant mortgaged his property comprised in LRV 4548 Folio 3 Plot 8760 Kyadondo Block 273, land at Nakinyuguzi in favour of the plaintiff subject to the terms of a mortgage deed dated 7th October, 2016. Following the execution of the facility agreement and mortgage deed, the plaintiff duly disbursed the facility sums to the 1st defendant in accordance with the terms and conditions of the facility letter which the 1st defendant fully utilised.

[2] On 7th June, 2018 the 1st defendant was granted and extended additional credit facilities, to wit: a term loan facility of shs. 250,000,000/= and another overdraft with a limit of shs. 300,000,000/= bringing the total overdraft limit to shs. 350,000,000/= all secured by a further charge on the prior mortgaged property. On 11th December, 2018, the 1st defendant was further extended another additional credit facility of shs. 376,752,489/= secured by a second further charge on the same mortgaged property. Despite utilising fully all the said facilities, the 1st defendant failed to comply with the repayment schedules as agreed and as a result

accumulated an outstanding loan amount of shs. 1,165,319,458/= and arrears of shs. 349,063,411/= which amounts continued to accrue interest.

[3] Consequently the plaintiff issued a notice of default dated 12th November, 2019 to the defendants demanding for the loan arrears of shs. 349,063,411/= It is the plaintiff's case that the defendants received the notice of default but failed to remedy the 1st defendant's default on repayment as requested by the plaintiff. The plaintiff consequently recalled the entire loan facility and instructed its lawyers to proceed with enforcement of the security provided by the defendants. The advocates formally issued several notices seeking to compel the defendants to settle the outstanding loan amounts owed to the plaintiff but the defendants did not heed to the notices. The 1st defendant eventually accumulated an outstanding loan amount of shs. 1,346,752,489/=

[4] Upon the 1st defendant's request, the plaintiff restructured the outstanding loan facilities by a loan offer letter dated 24th March, 2020 wherein it was agreed that the restructured facility would attract interest at the rate of 14% per annum that would accrue on daily outstanding balances. It was also agreed that the 1st defendant would repay the loan in equal monthly instalments of shs. 11,932,403/= as well as other terms of the agreement, which the 1st defendant expressly agreed to, thereby varying the terms of the mortgage deeds dated 7th October 2016, 7th June, 2018 and 11th December. 2018 to reflect that the repayment of the restructured facility was still secured by the mortgaged property. It is the plaintiff's case that despite the restructure of the credit facilities, the 1st defendant failed to comply with the agreed repayment schedule and defaulted on payments, contrary to the terms of the restructured facility agreement. Consequently, the plaintiff issued a notice of default dated 2nd December, 2021 to the defendants demanding for the loan arrears of shs. 1,000,271,981/= The defendants were required to pay the sums outstanding within 45 working days, failing which the plaintiff would proceed with enforcement. The defendants received the notice but failed to settle the sums demanded by the plaintiff. Consequently, the plaintiff issued a notice to

sell dated 8th February, 2022 to the defendants demanding settlement of that sum within 21 working days from the date of the notice but the Defendants failed to comply with notice.

[5] On 14th February, 2022 the defendants requested for a grace period of 90 (ninety) days within which to settle the outstanding loan amount through disposal of the mortgaged property. On 21st February, 2022 the plaintiff granted the 90 (ninety) day moratorium from 15th February, 2022 to 16th May, 2022 to the defendants to enable the defendants clear the outstanding loan obligations then amounting to shs. 1,118,304,045/=. On 3rd March, 2022 however, the defendants requested for an extension of the moratorium from 90 (ninety) days to 120 (one hundred twenty) days which was accepted by the plaintiff. It was expressly agreed that the defendants would handover vacant possession of the mortgaged property to the plaintiff on or before 23rd June 2022 if the defendants failed to clear the outstanding sums by 16th June, 2022. By that date, the defendants had not settled the outstanding amount. In the circumstances, the defendants were obligated to handover vacant possession of the mortgaged property to the plaintiff by 23rd June, 2022 as agreed by the parties.

[6] To the contrary, on 23rd June 2022, the plaintiff was informed that the 2nd defendant had entered into a tenancy agreement dated 20th June, 2022 with a one Kifle Bilen Monasy without the plaintiff's consent. Under the said tenancy agreement, the 2nd defendant rented the mortgaged property to Kifle Bilen Monasy for a period of 5 (five) years with the option to renew after the said 5 (five) year term. As of 23rd June, 2022 the 2nd defendant had received the sum of shs. 50,220,000/= from Kifle Bilen Monasy, being rent for the first 12 (twelve) months of the tenancy. Given the continued default by the defendants, the plaintiff commenced foreclosure proceedings for the mortgaged property in accordance with the terms of the mortgage deed and on 29th June 2022, the plaintiff issued and served the defendants with the statutory notice to take possession pursuant to section 24 (l) of *The Mortgage Act, 8 of 2009*. The plaintiff's efforts to sell the

mortgaged property were unsuccessful because the plaintiff could not obtain vacant possession of the mortgaged property, yet the defendants still owe the plaintiff a sum of shs. 1,022,757,051/=, hence the suit.

The defence to the claim.

[7] By his affidavit in reply the 2nd defendant contends that initially the loan facilities performed in a satisfactory manner. It is for this reason that the additional facilities were extended by the plaintiff to the 1st defendant. Subsequently the 1st defendant met challenges, not unique to it, caused by the unprecedented challenge of the worldwide pandemic of Covid-19, which resulted into national lockdowns and economic upheaval. The 1st defendant was affected just like other entities by this unexpected global economic crisis. The parties resolved the challenges associated with the earlier loans by restructuring the same into a new loan, as one of the methods recommended by the central Bank of Uganda for resolving the self-evident challenges caused by Covid-19 pandemic to borrowers. The loan restructuring pursuant to the plaintiff's Letter of offer dated 24th March, 2020 resulted into an entire new loan facility, which combined all earlier facilities into a single term loan. The term loan offered under the facility was for shs. 896,000,000/= with a tenor of 180 months. The said deed was duly registered on the mortgaged property as security for the restructured loan.

[8] By issuing the "Notice of Default" dated 2nd December, 2021 yet referencing two earlier "notices" issued under previous credit facilities dated 12th November, 2019 and 24th December, 2019 the plaintiff has not acted in good faith in respect the current mortgage facility. The plaintiff has acted in an unconscionable manner towards the defendant. The old facilities were completely resolved and extinguished by the restructured loan. As a condition for resolving the old facilities, and getting a new loan, the 1st defendant made payment to the plaintiff as part settlement of the old facilities. It is for this reason that the new term loan is only for

the sum of shs. 896,000,000/= as opposed to the previous overall loan exposure of shs. 1,346,752,489/=

[9] In the "Default Notice" dated 2nd December, 2021 the plaintiff acknowledged that the existing default was only to the tune of shs. 35,438,868/=. Instead of issuing a notice requiring the rectification of the said default, the plaintiff purported to recall the entire loan of shs. 1,000,271, 981/= which rendered the notice incurably defective in so far as it did not represent the actual default. The plaintiff further used the notice to make unlawful demand that the defendants to pay 10% of the entire loan in legal fees to the plaintiff's lawyers, thus imposing upon the defendants an extra burden of an additional approximately shs. 100,000,000/=. The plaintiff's expressed unwillingness to receive shs. 35 438,606/= that was actually due and outstanding as a rectification of the default was grossly oppressive to the defendants, unreasonable and unfair. The onerous conditions imposed on the defendants in the impugned default notice were intended to stifle the defendant's statutory right to discharge the loan and protect their ultimate right of redemption. It was oppressive, unreasonable and unfair for the plaintiff, who assessed the 1st defendant's capability to pay and consequently granted a 15-year term loan, to demand that the defendants settle the entire loan in the space of only 45 working days. A valid notice of sale must be preceded by a valid Notice of Default.

[10] The defendants would not have needed to request any moratorium if the plaintiff had only required the 1st defendant to cure my actual default, which was only shs. 35,453,606/=. The only reason the defendants were forced to plead with the plaintiff for time was because of the plaintiff's oppressive conduct in unreasonably recalling the entire loan and demand for payment of colossal sums in legal fees. The 2nd defendant's attempts to rent out the mortgaged property were driven by his desperation to find ways and means of raising money to defray the loan. Rather than facilitate these efforts, the plaintiff went out of its way to frustrate the efforts instead. When the 2nd defendant rented out the mortgaged property, he instructed

the tenant to deposit shs. 50,220,000/= onto the 1st defendant's current account with the plaintiff. This he did on 20th and 21st June, 2022. However, on 24th June 2022, the plaintiff reversed the deposit, but with a reduced figure of shs. 49,151,000/=. By so doing the plaintiff further frustrated he 2nd defendant's attempts to defray the loan.

[11] Had the plaintiff allowed the 2nd defendant to rent the mortgage property it would have enabled the defendants to guarantee payment of shs. 60,000,000 per annum for 5 years. This would have required the defendants to raise only shs. 84,000,000 per annum to meet its residual obligations. Despite the plaintiff's obstructive behaviour, the defendants managed to pay into the bank account the total sum of shs. 74,514, 300/= and had the plaintiff not rejected the shs. 60,000,000/= payable under the tenancy agreement, the defendants would have substantially satisfied their loan obligations with a combined payment of approximately shs. 134, 514, 300/= over the course of the year. The defendants seek Court's intervention by taking cognizance of the oppressive, unreasonable and unfair conduct of the plaintiff and as a court of justice, to declare the impugned notices void and incapable of supporting the orders sought by the plaintiff.

<u>The questions for determination;</u>

[12] These proceedings have been taken out under the provisions of section 20 and 24 (2) (c) of *The Mortgage Act, 8 of 2009*, section 98 of *The Civil Procedure Act,* section 33 of *The Judicature Act* and Order 37 Rules 4 and 8 of *The Civil Procedure Rules.* By virtue of the latter, any mortgagee, 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, conveyance or delivery of possession by the mortgagee. The following are the matters in issue between the parties, namely;

1. Whether the plaintiff is entitled to delivery of possession of the mortgaged property by the Mortgagors, their agents, servants, employees, or contractors as provided under section 24 (2) (c) of *The Mortgage Act, 8 of 2009.*
2. Whether the plaintiff as mortgagee is entitled to an order to enter possession of the mortgaged property as one of the remedies availed to the Plaintiff under section 20 (d) of *The Mortgage Act, 8 of 2009.*
3. Whether the plaintiff as mortgagee is entitled to an order of eviction to enable it enter possession of the mortgaged property.

[13] Having found that there was no fundamental disagreement between the parties as to the correctness and sufficiency of the facts set forth in the summons and affidavit, and neither having found it necessary that the summons be supported by any further evidence, nor the need of taking evidence viva voce, the Court proceeded to hear the arguments.

The submissions of counsel for the plaintiff;

[14] Counsel for the plaintiff submitted that the plaintiff must demonstrate a breach and statutory notice and if the breach has been remedied. It is not in dispute that by the time a notice of default was issued, annexure "I", the defendant was in default. Following that notice the defendant tried even after 45 days of rectification. He asked for additional time as per annexure "K", "L" M1 and M2 in support of the suit. Notwithstanding the extensions the defendant still failed to remedy the default. In a disparate attempt the defendant even tried to let the security to a third party for a consideration of shs. 50,000,000/= per annum contrary to the terms of the restructure agreement; clause 7.4 and 7.5 of the agreement and section 18 (g) of *The Mortgage Act.* By letting out the property without the consent of the plaintiff the defendant not only sought to vary the terms of the restructure agreement unilaterally but also deliberately sought to mislead that they had complied with the

terms of the notice of default and the restructure agreement. The tenancy agreement is N2. Annexure O2 and O3 the plaintiff rejected the shs. 50,000,000/- on account of the tenancy for two reasons. The payment still fell short of the monthly instalments. The shs. 35,000,000/= was a three month's default of shs. 11,932,403/= per month. It was rejected leaving the defendant having failed to comply with the terms for remedying the breach. There has not been foreclosure which was frustrated by a tenancy agreement with a third party occupying the premises as tenant of Jonathan Katende who is the registered owner. We intend to take possession for purposes of sale. The defendant had undertaken to look for a buyer.

[15] Section 19 (3) (b) *of The Mortgage Act* gives the right of recall. A wholesome reading of the agreement will provide for the right. The equity of redemption is not available to someone without clean hands. The rejection is justifiable. The notice of default issued in December, expiring January, by February nothing was paid and not by June 1st had the 35 million been paid. The rent came to the scene a week after expiry on 6th June. The tenancy was on 23rd June. The moratorium was to yield the property by 23rd June. It is timed to prevent possession not to generate income.

<u>The submissions of counsel for the defendant;</u>

[16] In response, counsel for the respondent submitted that the notice of default is a violation of the terms of the agreement and section 19 of *The Mortgage Act*. Annexure "I" is termed notice of default but purports to recall the entire loan and not only requires the debtor to rectify the default but also prohibits rectification. In paragraph 1 reference is made to two previous notices of 2019 and notice to sale dated 18th February, 2020. They predate annexure "G" They refer to the old credit faculties. The default was resolved in two ways; para 9 of the respondent's affidavit shows a reduction to shs. 809,000,000/= by way of a bulk payment reducing the loans by about 30% In paragraph 19 reliance on the old notices are addressed.

The first paragraph points out the amount in default. Instead of requiring rectification they next recall the entire loan. In the last paragraph, the defendant is required to pay 10% as legal fees. The last sentence gives expiry of notice. It is for the full amount. It is not justified by the law or the terms.

[17] The defendant was faced with oppressive conduct by the plaintiff hence he became desperate. The letting out was for enabling the mortgagor to pay. There is a right to discharge the debt and any attempt to fetter the right is void for being unconscionable; section 14 of *The Mortgage Act*. Sending back the money and opposing him from letting. The loan period is for 6 years. The defendant is a person doing to do his best to pay the loan. He needed 90 days to pay a billion being demanded for. That consent was not sought out of desperation.

The decision;

[18] The practice of originating summons is to enable simple matters to be settled by the Court without the expense of bringing a suit in the usual way; where there are no serious disputes as to facts (see *Kulsumbai Gulamhussein Jaffer Ramji and another v. Abdulhussein Jaffer Mohamed Rahim, Executor of Gulamhussein Jaffer Ramji, Secretary, Wakf Commissioners, Zanzibar and others [1957] E.A 699).* This procedure entails the interpretation of documents, wills, deeds, enactments, or any other written instrument. It also involves the determination of any question of construction arising under the instrument and for a declaration of rights of persons interested. Where there is no question of construction the procedure by originating summons is inappropriate, as pointed out in *Lewis v. Green [1905] 2 Ch. 340 at 344;*

> It is only intended to enable the court to decide questions of construction where the decision of those questions, whichever way it may go, will settle the litigation between the parties. It is not intended that questions of construction which, if they were decided in one way only will not settle the dispute between the parties, should come up for decision on an originating summons. It would be most inconvenient to resort to the order in a case where it is quite uncertain what may be

the ultimate decision on the point of construction, and where if the decision is in one way it involved further litigation.

[19] An action is commenced by an originating summons when; (a) it is required by a statute, or (b) the dispute concerns matters of law, where there is unlikely to be any substantial dispute of fact. The originating summons in the instant case seeks the determination of questions of construction in order to make a declaration of rights arising under the restructured outstanding loan facility offer letter dated 24th March, 2020, viz-a-viz the terms of the credit facility documents dated 7th October, 2016, 7th June, 2018, and 11th December. 2018, alongside the mortgage respective deeds dated 7th October 2016, 7th June, 2018 and 11th December. 2018.

i) Whether the plaintiff is entitled to delivery of possession of the mortgaged property by the Mortgagors, their agents, servants, employees, or contractors as provided under section 24 (2) (c) of *The Mortgage Act, 8 of 2009*.

[20] The 1st defendant does not dispute having defaulted on the agreed terms of repayment under the restructured loan agreement of 24th March, 2020. The defendants fault the plaintiff only for having issued a "Notice of Default" dated 2nd December, 2021 but referencing two earlier "notices" issued under the previous credit facilities dated 12th November, 2019 and 24th December, 2019 and for having recalled the entire loan rather than called for rectification of the default. The defendants contend that the old facilities were completely resolved and extinguished by the restructured loan. As a condition for resolving the old facilities, and getting a new loan, the 1st defendant made payment to the plaintiff as part settlement of the old facilities. The validity of this contention is dependent on whether or not the restructured loan agreement was an accord and satisfaction or rather a mere modification, revision or substitution of the two previous loan agreements.

[21] An accord and satisfaction is an agreement to discharge a claim in which the parties agree to give and accept different performance which is usually less than what is required or owed (see *Pinnel's Case [1602] 5 Co. Rep. 117a*). It deals with a debtor's offer of payment and a creditor's acceptance of a lesser amount than the creditor originally claimed to be owed. An accord and satisfaction is a substitute contract for settlement of a debt by some alternative other than full payment. The consideration for an accord is often the resolution of a disputed claim. The compromise of a dispute between parties will serve as consideration for an accord and satisfaction when the dispute is bona fide: that is, the dispute is asserted in good faith and the subject matter is reasonably doubtful. Consideration will exist if the claim is actually doubtful or if the forbearing party believes the claim or defence is valid. Forbearance on a claim or defence relative to a dispute that is not made in good faith and is not reasonably doubtful is of no value.

[22] There must be new consideration independent of the original consideration, something the debtor has no legal obligation to do, or a refrain from doing something the debtor has a legal right to do, to support an accord and satisfaction. The law on consideration exists to enforce mutual bargains, not gratuitous promises. The pre-existing legal duty rule seeks to protect one party when the other is trying to get more for what that party already has a "legal duty" to do. Accordingly, payment of a claim or debt that one already is obligated to pay, when the claim or debt is due and owing, ascertainable in amount, and not controverted, will not serve as consideration for an accord.

[23] Accord and satisfaction is a method of discharging a claim by settlement of the claim and performing the new agreement. The accord is the agreement and the satisfaction its execution or performance (see *British Russian Gazette and Trade Outlook Limited v. Associated Newspapers Limited [1933] 2 KB 616* and *Phenny Mwesigwa v. Petro Uganda Limited, S. C. Civil Appeal No. 10 of 2019*). A new contract is substituted for an old contract thereby discharging an obligation or cause of action based on the old contract, which is settled. An accord being an

agreement that is made between two or more contracting parties in which the performance being of the arrangement will replace an original performance agreed upon, and satisfaction being the carrying out of that accord, an accord and satisfaction will discharge the original contractual obligation.

[24] An accord and satisfaction therefore is a substituted, and usually compromised, performance for an existing contractual obligation. In order for a party to use the accord and satisfaction defence in court, it must generally prove the following: the parties had a binding agreement, there was a dispute between the parties regarding the quality of the item or service provided by the creditor or the amount owed by the debtor, the parties intentionally agreed to settle an existing obligation with a lesser payment, the payment was accepted, by accepting the lesser amount, the creditor indicated satisfaction with the previous agreement, and finally that accepting the payment was accompanied by communication that the lesser amount settled the debt, which may imply accepting the new terms of the agreement. For example, in *Saraswat Trading Agency v. union of India (2002), AIR 2002 Cal 51* the court held that the debtor could not insist that his payment be recorded as full satisfaction of all claims if the creditor agreed that if the debtor paid a lesser sum than due before the specified date, it would be accepted as full satisfaction of all claims, but the debtor paid a still lesser sum before the specified date.

[25] The accord is the agreement on the new terms of the contract, and the satisfaction is the performance of those terms according to the agreement. Satisfaction though is not achieved until there has been full compliance with the accord. For example, in *Barbarich v. Chicago, Milwaukee, St. Paul & Pacific Railway, 92 Mont. 1, 9 P.2d 797 (1932),* the plaintiff had a tort claim against the defendant railroad. After negotiating a settlement of the plaintiff's claim for US $500 and a railway pass, the defendant sent a check and the pass to the plaintiff's lawyer. The plaintiff then repudiated the settlement. The defendant first claimed that the plaintiff had settled the claim for its promise of payment, not the performance. Analysing the intent, the

court held that the parties intended to settle the obligation by performance. The defendant next claimed that since it had performed by delivering the draft and pass to the plaintiff's lawyer, the obligation was satisfied by accord and satisfaction. The court held that there was no performance, for the defendant tendered a check rather than cash, and the plaintiff's lawyer lacked authority to endorse the check. Therefore, an accord and satisfaction does not replace the original contract; rather, it suspends that contract's ability to be enforced, provided that the terms of the accord are satisfied as agreed upon. If, for some reason, the debtor does not deliver on the new terms, it may be liable for the original contract because it did not satisfy the terms of the accord.

[26] On the other hand, a change to an existing contract is a modification. A contract modification or amendment is a formal alteration made to an already signed contract. It is used to change, delete or add specific terms or provisions within the original agreement while leaving the rest of the document intact. With a revised agreement, the contracting parties agree to change the terms of their original agreement, while a contract addendum is an additional document that is attached to the original contract. It is used to include supplementary information, such as additional terms, conditions or provisions. Unlike an amendment, an addendum does not modify the existing terms of the contract, but rather it expands upon them. Addendums are typically used when parties wish to incorporate new details without disrupting the core elements of the original agreement. If the changes are relatively minor and do not impact the fundamental aspects of the contract, an addendum is the right choice. For example, adding a new product option, specifying additional delivery instructions or including a non-material clause are all common circumstances for using an addendum. If on the other hand the modifications are substantial and affect the core terms of the agreement, it is generally appropriate to use an amendment. For instance, changing the pricing structure, extending the contract duration or altering key obligations would call for an amendment.

[27] A contract modification could for example change the scope of the contract, the contract price, or both. The modification creates or changes the enforceable rights and obligations of the parties to the contract. Modification of a contract does not require new consideration; it only does so when it is one party to the contract making the modification. A modification, unlike a substituted contract, merely replaces some of the terms of a valid and existing agreement while keeping those not abrogated by the modification in effect. The contract remains in effect but certain terms or obligations are modified. Therefore, contract modification or variation occurs when parties decide to perform part of a contract differently from the way they had originally agreed. This means that, if a "variation" is so substantial that it undermines the original purpose of the contract, it probably won't be treated as a variation by the court. Instead, the court will consider the original contract to have been terminated and replaced by the new agreement.

[28] Substituted contracts require a change to be made to the entire contract. The substituted contract replaces the original contract, completely taking its place and discharging the terms of the original contract. For example, if two parties have separate contracts and wish to merge them into one, they can do so by entering into a substituted contract. Substituted contracts discharge the previous contracts immediately and merge it into the new contract. According to section 51 of *The Contracts Act, 7 of 2010,* where the parties to a contract agree to substitute for the original contract a new contract or to rescind or alter the original contract, the original contract need not be performed. The substituted contract in effect renders the original contract unenforceable unless there is a specific agreement in place that states otherwise. The old contract does not hover, but is extinguished as soon as the new, substituted contract is made. In short, a substituted contract is a new agreement that replaces and cancels out the obligations of the original contract. It is used to change the terms of a contract, terminate a contract, or merge two contracts. In compromising an obligation by entering a substituted contract, a creditor settles for the promise of performance, not performance itself. Under a substituted contract, therefore, if the debtor does not perform, the creditor is stuck

with enforcing the new promise. The creditor may sue on the substituted contract but may not revive the original claim.

[29] During the contract period, the lender could enter into a new contract to provide different credit to the same borrower. The Court will assess whether the new contract is a modification to the existing contract, or a new contract. Factors to consider could include whether the terms and conditions of the new contract were negotiated separately from the original contract and whether the terms of the new contract depend on the terms of the existing contract. If the new contract transfers distinct credit to the borrower upon new standalone terms, it will be construed to be a new contract, not as a contract modification. Even if it is structured as a termination of the existing contract and creation of a new contract, if the new credit is offered at a discount to existing terms, the Court will need to evaluate the reason for the discount as this may be an indicator that the new contract is a modification of the existing contract. An agreement to modify a contract could include adjustments to the terms of credit already transferred to the borrower. In determining whether the parties intended the new promise or the performance to discharge the then existing obligation, courts consider: (1) whether the parties formed the new contract before any breach of the original; (2) if after breach, whether the breach was disputed; (3) if after breach, whether the amount of the claim for breach was liquidated. In case (1), it more likely to be construed as a substituted contract; in (2) and (3), it is more likely to be construed an accord and satisfaction.

a. Whether the offer letter of 24th March, 2020 completely resolved and extinguished the terms of the previous loans.

[30] In the instant case, the contract of 24th March, 2020 was formed after breach of the original contracts of 19th May, 2016, amended by that of 7th October, 2016 and later by that of 10th December, 2018, the breach was not disputed and the amount of the claim for breach was liquidated. By the offer letter of 24th March, 2020, the

plaintiff offered terms for the restructuring of the 1st defendant's then existing debt. The letter expressly stated;

> This facility letter will constitute an amendment to the previous facility letter dated December 10 2018. All securities used as collateral in the previous facility letter shall remain in force to secure the obligations made under this facility letter unless otherwise agreed by the Bank and the borrower to the contrary.

[31] The changes introduced into the offer of 10th December, 2018 by the restructured loan terms contained in the offer letter of 24th March, 2020, include; - conversion of the bonds and guarantees limit of shs. 370,000,000/=, the overdraft limit of shs. 350,000,000/=, the term loan facility of shs. 250,000,000/=, and the additional credit facility of shs. 376,752,489/=, all into a term loan of shs. 896,000,000/=; increment of the tenure of the credit facility from 365 days to 180 months; from a facility repayable on demand to one repayable by monthly instalments of shs. 11,932,403/=; reduction of the interest rate from 26% per annum to 14% per annum; and deletion of and replacement of some of the conditions precedent to the facility utilisation, but otherwise the rest of the general terms and conditions remained the same. The alterations affected only a handful of clauses (they could practically all fit on half a page) out of a total of 21 clauses constituting the entire contract, with multiple sub-clauses and paragraphs covering a total of 35 pages in all, in fine or small print. The defendants seek to have this offer letter construed either as an accord and satisfaction or as a substituted contract.

[32] Accord and satisfaction can be described as an agreement made after breach whereby some consideration, other than the defaulting party's legal remedy, is to be accepted by the party not at fault, followed by performance of the substituted consideration. An enforceable accord and satisfaction arises when a party against whom a claim of breach of contract is asserted proves that (1) the party, in good faith, tendered an instrument to the claimant as full satisfaction of the claim; (2) the instrument or an accompanying written communication contained a conspicuous

statement to the effect that the instrument was tendered as full satisfaction of the claim; (3) the amount of the claim was unliquidated or subject to a bona fide dispute; and (4) the claimant obtained payment of the instrument. The distinctive feature of an accord and satisfaction is that the creditor does not intend to discharge the existing claim merely upon the making of the accord. She or he can do so only upon performance or satisfaction. If the satisfaction is not tendered, the creditor may sue under the original claim which is revived by the breach, or for breach of the accord. The old agreement hovers until the performance is complete and can be revived if performance is not completed.

[33] Here, however, it is the defendants' contention that the amount of shs. 896,000,000/= reflected in the restructured loan agreement yet at the time their loan obligation stood at shs. 1,346,752,489/= is proof that the 1st defendant made payment to the plaintiff as part settlement of the old facilities as a condition for resolving the old facilities, and getting a new loan. If this be the only "consideration" offered by the 1st defendant for the restructuring, then it fails as valid consideration to support an accord and satisfaction. Payment of a debt that one already is obligated to pay, when the debt is due and owing, ascertainable in amount, and not controverted, will not serve as consideration for an accord. In any event, the 1st defendant only made part payment of the amount outstanding under the terms of the restructured loan agreement. When making that payment, the defendants did not offer it as a substituted, or compromised performance. In short, the defendants did not offer a lesser sum as a compromised substituted performance to satisfy the restructured loan agreement. The parties did not agree on any substituted, or compromised performance. The offer letter of 24th March, 2020 therefore does not qualify as an accord and satisfaction of the original contract of 19th May, 2016, as amended by that of 7th October, 2016 and later by that of 10th December, 2018.

[34] Similarly, the changes introduced by the offer letter of 24th March, 2020 into the original contract of 19th May, 2016, as amended by that of 7th October, 2016 and

later by that of 10th December, 2018, do not constitute a replacement of the entire contract. The variations are not so substantial as to undermine the original purpose of the contract. The offer letter of 24th March, 2020 merely replaced some of the terms of the otherwise valid and existing agreement, by making adjustments to some of the terms of credit already transferred to the 1st defendant as borrower, while keeping those not abrogated by the modification in effect. For all intents and purposes therefore, the restructured loan agreement of 4th March, 2020 did not completely resolve, extinguish and replace the terms of the previous loans.

b. Whether in the circumstances the plaintiff's referencing of two earlier default notices dated 12th November, 2019 and 24th December, 2019 issued under the previous credit facilities, in the "Notice of Default" dated 2nd December, 2021 invalidated that notice.

[35] The entire regime of notices to the debtor before exercise of the power of sale provided for under *The Mortgage Act*, 8 of 2009 is intended to buttress and preserve the mortgagor's entitlement to redeem the mortgage as recognised by section 8 of the Act. They are safeguards against improper exercise of the statutory power of sale which may be exercised by a mortgagee who need not come to court because of the power of sale reserved by the mortgage deed. Hence, the mortgagor is required to give the mortgagor; (i) a notice in writing of the default and require the mortgagor to rectify the default within a period of not less than twenty-one working days, by the end of which the payment in default must have been made (section 19 (3) (b) of the Act); which if not complied with, issue (ii) a notice in writing of the default and require the mortgagor to rectify the default within forty-five working days (section 19 (2) of the Act).

[36] Where a mortgagor is in default of his or her obligations under a mortgage and remains in default at the expiry of the time provided for the rectification of that default in the notice served on him or her under section 19 (3) of the Act, a mortgagee may exercise his or her power to sell the mortgaged land (section 26

(1) of the Act); in that case the mortgagee is required before exercising the power to sell the mortgaged land, (iii) to serve a notice to sell on the mortgagor and not to 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 sell (section 26 (2) of the Act). The mortgagee's power of sale cannot be exercised in the absence of evidence of fulfilment of the statutory requirements as to notice (see *GT Bank Ltd v. Richline International Ltd and another, H. C. Civil Suit No. 10 of 2014 (OS)* and *Ecumenical Church Loan Fund Uganda Ltd v. Ways Km Uganda Ltd H. C. Civil Suit No. 11 of 2014 (OS*).

[37] The premise of the doctrine of redemption lies in the practice of value, equity, and good conscience and is applicable to all processes of the transaction. Redemption of a mortgage cannot be fettered or clogged by any action that makes the property non-redeemable. Any actions or steps taken by the mortgagee in contravention of the statutory procedures, which are designed to constrain the right of redemption, or have such an effect by placing obstacles to the right of redemption, will be invalid and void. Giving ineffective or inadequate notice to rectify, of default or of sale would have such an effect due to the resultant denial of a fair opportunity to the mortgagee to redeem the property. The mortgagor has this right of redemption and may exercise it at any time before the mortgaged property is sold to a third party upon default. Accordingly, the mortgagor may redeem his mortgaged property any time before acceptance of a bid in a public auction or on execution of sale agreement under a private agreement of sale (sale by private treaty). The mortgagor may also redeem and discharge the property at any time, even before the redemption date (early repayment) if he pays the entire debt and performs all the conditions and obligation in the mortgage deed.

[38] In the instant case, the plaintiff complied with the statutory requirements as to notice of default by way of notices to rectify and default notices dated 12th November, 2019, 24th December, 2019 and 2nd December, 2021 respectively. Having found that the restructured loan agreement of 24th March, 2020 was

neither a substituted contract nor an accord and satisfaction, but rather a variation that did not replace the existing contract, the fact that the default notice dated 2nd December, 2021 referenced the earlier two notices did not therefore detract from its validity.

c. Whether the plaintiff's rejection of the 2nd defendants' tenancy agreement with a one Kifle Bilen Monasy without the plaintiff's consent, in respect of the mortgaged property, constitutes oppressive and unfair conduct on the part of the plaintiff.

[39] Generally, borrowers and lenders enter into loan agreements that suit both of their needs. Borrowers make many choices when taking out a loan. They choose to borrow, who to borrow from, how much to borrow, and what type of loan to get. Lenders have commercial decisions to make. Courts recognise the need to balance the interests of both parties and will not want to change those agreements unless there are very good reasons to do so. It is not the business of the court to rewrite a contract for the parties. It is trite though that a mortgagee may not act toward the mortgagor, in an oppressive, harsh, unjustly burdensome, unconscionable, manner, or in breach of reasonable standards of commercial practice. Courts therefore have an inherent power in equity to intervene, exceptionally, if the terms of the loan are oppressive or the lender has acted in an oppressive way when entering into the loan, or when exercising their rights or powers under it.

[40] In determining whether or not a mortgagee's conduct in exercising his or her rights or powers under the mortgage is harsh or burdensome, the court will look at what reasonable standards of commercial practice would involve. The court will compare what is expected or acceptable commercial practice, and what oppressive conduct is alleged against the mortgagee in each particular case. Here, it is the defendants' case that the plaintiff unreasonably recalled the entire loan, adding thereto, a demand for payment of colossal sums in legal fees. Letting out

the property to Kifle Bilen Monasy was the 2nd defendant's desperate attempt to find ways and means of raising money to defray the loan. Rather than facilitate these efforts, the plaintiff went out of its way to frustrate the efforts instead.

[41] This contention is unsustainable, firstly, because Clause 5.1 of the mortgage deed expressly provides that if an Event of Default as described under the Loan Documents shall occur and be continuing for a period of thirty (30) days, all sums outstanding on the Mortgage Debt, shall become due and payable and the Bank, may without applying to Court exercise the powers and remedies provided under *The Mortgage Act, 2009* and the Loan Documents. Clause 10.1 of the offer letter dated 24th March, 2020 specifically lists as an event of default, the borrower's failure to pay on the date indicated in any written demand from the Bank, of any amount payable by it pursuant to the Loan Documents. Both clauses are consistent with reasonable standards of commercial practice. There is no evidence to show, and indeed it is not the defendants' case, that the plaintiff, or anyone else, used unfair pressure or tactics or some other kind of unfair influence to encourage the defendants to enter into this contract on 24th March, 2020.

[42] Secondly, although at common law, both a mortgagor and mortgagee have long had the power to lease the mortgaged land (see *Employers Assurance Association Ltd v. Union Land and House Investors Ltd. [1937] Ch. 313 at 317),* however this is only as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing. In general terms by commercial practice, and also by section 18 (g) of *The Mortgage Act,* the creation of a mortgage prevents the mortgagor from some types of dealings with the mortgaged asset while it is subject to the mortgage, without the consent of the mortgagee. Clause 7.9 of the offer letter dated 24th March, 2020 specifically provides as follows;

7.9 Other dealings with the Secured Assets

Each of the Chargors undertakes that it shall not (and shall not agree to), without the Bank's prior written consent, at any time during the subsistence of this Deed:

a) Register any person under *The Registration of Titles Act* as proprietor of the Secured Assets or any part thereof; or

b) Lease or sub-lease or encumber the Secured Assets; or

c) Create of permit to arise or subsist any overriding interest in relation to the Secured Assets.

[43] These terms are reasonably necessary to protect the plaintiff's interests as mortgagee, while at the same time allowing the 2nd defendant as mortgagor a reasonable opportunity to comply with the demands of generating revenue to repay the loan. All that was required of the 2nd defendant was to seek the plaintiff's prior consent, which by convention and statute, would be expected not to be unreasonably denied. If such prior written consent is not obtained by the mortgagor and the mortgagor proceeds to enter into a tenancy or lease agreement with a tenant, the tenancy will be binding on the mortgagor as landlord, but as against the mortgagee, the tenancy will not be binding. The mere fact that the mortgagee is aware of the existence of a tenancy and that a tenant is paying rent to the mortgagor which is being used to pay the obligations of the mortgagor to the mortgagee, is not, of itself, sufficient to create a relationship between the mortgagor's tenant and the mortgagee. Such a tenant has no entitlement to remain in occupation and is a trespasser.

[44] A tenancy or lease created by a mortgagor without the consent in writing of the mortgagee, where the requirement of such consent is expressly stipulated for in the mortgage deed, is void as against the mortgagee and the mortgagee is not bound by it. In the absence of special circumstances, where a mortgagor's powers to grant a lease or tenancy have been explicitly curtailed, a lease or tenancy granted without consent will not be enforceable against a mortgagee. Considering that the 2nd defendant was acting in breach of the undertaking contained in Clause

7.9 of the offer letter dated 24th March, 2020, the plaintiff was justified in rejecting the tenancy. That does not constitute oppressive, harsh, unjustly burdensome, unconscionable, conduct on the part of the plaintiff, nor was the plaintiff in breach of the reasonable standards of commercial practice when it prevented performance of the tenancy agreement.

d. Whether the plaintiff's rejection of the defendants' part payment constitutes oppressive and unfair conduct on the part of the plaintiff.

[45] It further the defendants' case that when the 2nd defendant rented out the mortgaged property, he instructed the tenant to deposit shs. 50,220,000/= onto the 1st defendant's current account with the plaintiff, which he did on 20th and 21st June, 2022, only for the plaintiff to reverse it on 24th June 2022, albeit with a deduction of shs. 1,069,000/=. The defendants contend that by so doing the plaintiff further frustrated he 2nd defendant's attempts to defray the loan since he planned to raise shs. 60,000,000 per annum for the 5-year rental period.

[46] Frequently a debtor offers to settle a claim by paying the creditor a smaller amount, accompanied by a letter stating the claim is disputed and the payment is offered in full settlement of the account. If the creditor then uses the amount paid, the account will be deemed satisfied. If the creditor nonetheless files suit to collect a balance claimed still to be due, proof of the offer to settle and its acceptance by the creditor (by appropriating the amount paid) will be a full defence for the debtor. A problem therefore arises when the creditor appropriates the amount paid while attempting to preserve the right to collect any balance. In some cases, after the creditor receives the payment and any accompanying letters or vouchers, the creditor crosses out the language about full payment and, perhaps, even writes something like "under protest" beneath the crossed-out words. The creditor then appropriates the amount.

[47] The common law courts had little difficulty with this behaviour. Because the payment was offered on the condition that the creditor accepts it as payment in full, the only way the creditor could appropriate the payment was by accepting the condition (see for example, *Union of India v. Kishorilal Gupta and Bros., AIR 1959 SC 1362; Kapurchand Godha v. Mir Nawab Himayatalikhan Azamjah, AIR 1963 SC 250; (1963) 2SCR 168; Snow View Properties Ltd. v. Punjab & Sind Bank, AIR 2010 Cal 94 and Union Carbide Corpn v. Union of India (1991) 4 SCC 584; AIR 1992 SC 31)*. The creditor's choice was either to agree or to return the payment. It is the deed rather than the thought that counts. Deciding whether to take what is now available or wait and see whether one can get more in the long run is the choice a litigant makes every time a settlement is offered. The offeree must either accept the offer on its terms or reject it.

[48] Rejection of the part payment therefore does not constitute oppressive, harsh, unjustly burdensome, unconscionable, conduct on the part of the plaintiff, nor was the plaintiff in breach of the reasonable standards of commercial practice when it prevented performance of the tenancy agreement. For all intents and purposes, the lengthy judicial foreclosure process is intended to benefit the mortgagor by giving him or her every opportunity to remedy the default, modify the terms of the loan, and redeem the property prior to foreclosure. In the same vein, statutory provisions for sale favour a public auction to a sale by private treat mainly because matters of foreclosure are uniquely equitable in nature despite certain limitations stemming from the nature of the in rem proceedings. Accordingly, it is ordered and decreed that sale of the mortgaged property in the instant case shall; by public auction in accordance with the relevant provision of *The Mortgage Act, 8 of 2009* and *The Mortgage Regulations, 2012.*

ii. <u>Whether the plaintiff as mortgagee is entitled to an order to enter possession of the mortgaged property as one of the remedies availed to the plaintiff under section 20 (d) of The Mortgage Act, 8 of 2009.</u>

iii. Whether the plaintiff as mortgagee is entitled to an order of eviction to enable it enter possession of the mortgaged property.

[49] The mortgagee's remedies are cumulative and alternative. A mortgagee is therefore not bound to select any one of the remedies and pursue that particular remedy exclusively. A mortgagee is at liberty to employ one or all of the remedies to enforce payment, and in no particular order. Being cumulative, none of them is in exclusion of the others. No act of the mortgagee may be construed as an election to proceed under any one remedy existing at law or in equity or by statute or otherwise, to the exclusion of any other.

[50] According to section 24 (1) and (2) of *The Mortgage Act*, 8 of 2009, (1) a mortgagee may, after the end of the period specified in section 19 of the Act, and after serving a notice of not less than five working days of his or her intention to do so, enter into possession of the whole or a part of the mortgaged land, by either; (a) entering into and taking physical possession of the land or a part of it during the day time using only such force as shall be reasonable in the circumstances, or (b) by asserting management or control over the land by serving a notice in the prescribed form requiring any lessee of the mortgagor or any other occupier of the land to pay to the mortgagee any rent or profits which would otherwise be payable to the mortgagor; or alternatively (c) under an order of court.

[51] The power of sale allows the mortgagee to convey the mortgaged property to a purchaser, free and clear of the interest of the mortgagor and any other subsequent interests in the property. The defendants' right, title and equity of redemption to and in the mortgaged property described as LRV 4548 Folio 3 Plot 8760 Kyadondo Block 273, land at Nakinyuguzi, in Kampala, having been foreclosed under the plaintiff's power of sale, it is ordered and adjudged that the defendants forthwith deliver to the plaintiff or as the plaintiff directs, possession of the mortgaged property or of such part of it as is in the possession of the defendants.

iv. Whether the plaintiff should be granted the costs of the suit.

[52] The general rule under section 27 (2) of *The Civil Procedure Act* is that costs follow the event unless the court, for good reason, otherwise directs. This means that the winning party is to obtain an order for costs to be paid by the other party, unless the court for good cause otherwise directs. I have not found any special reasons that justify a departure from the rule.

Order;

[53] Therefore in conclusion, judgment is entered for the plaintiff against the defendants jointly and severally, as follows;

a) The right, title and equity of redemption of both defendants to and in the mortgaged property described as LRV 4548 Folio 3 Plot 8760 Kyadondo Block 273, land at Nakinyuguzi, in Kampala, are hereby foreclosed for purposes of sale.

b) For the purposes of that sale, the defendants are ordered forthwith to deliver to the plaintiff or as the plaintiff directs, possession of the mortgaged property or of such part of it as is in the possession of the defendants, failure of which they shall forthwith be evicted therefrom.

c) The costs of the suit.

Delivered electronically this 3rd day of January, 2024 ……Stephen Mubiru……

Stephen Mubiru
Judge,
3rd January, 2024.

Appearances

For the plaintiff : M/s S. & L. Advocates,

For the defendant : M/s Byenkya, Kihika and Co. Advocates