THE REPUBLIC OF UGANDA

IN THE NIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT)

HCCS NO. 356 OF 1998

DIAMOND TRUST BANK (U) LIMITED…… PLAINTIFF

VERSUS

1. MUHINDO ENTERPRISES LTD]
2. JAMAL KALEMIRE MUHINDO] ……DEFENDANTS
3. FAPJDA K. MUHINDO]

BEFORE: THE HONOURABLE MR. JUSTICE JAMES OGOOLA

JUDGMENT

Plaintiff Bank sued the three Defendants jointly and severally for unpaid balance on a loan agreement, a guarantee deed and a mortgage deed. The first Defendant was the principal borrower. The Second and Third Defendants were guarantors/mortgagors. Defendants counterclaim in mesne profits.

Counsel for both parties made their oral submissions, with Plaintiff's counsel reserving the right to reply through a written submission. Subsequently, he abandoned the right to make any reply at all. In the course of the oral hearings, the Defence made a number of important concessions of fact, which have helped narrow the dispute and the issues tremendously. In particular, the Defence conceded to the following:

(a) existence of the loan agreement between the First Defendant and the Plaintiff, in the amount of Shs.75m/-, payable in 33 equal monthly instalments, at an interest rate of 23% p.a. (plus a further penalty interest rate of 2% p.a. in the event of accumulated arrears of payments);

(b) default in repayments by the First Defendant starting from April 1996, to the date of filing suit. At 6/6/98 the outstanding repayments stood at Shs.112,107,924/-;

(c) Second and Third Defendants having guaranteed the above loan; mortgaged the suit property to the Plaintiff bank; and having paid a total sum of Shs.29m/- towards its repayment;

(d) there having been three professional valuations of the mortgaged property - the first one in May 1994 (for Shs. 185m/-); the second one in October 1997 (for Shs.90m/-); and the third one in May 1998 (for Shs.80m/-);

(e) Plaintiff having repossessed the property in September 1997 upon grant of a Court Order to do so (see MA No. 232/97); and upon evicting the Second and Third Defendants therefrom; and that subsequently Plaintiff sold off the property for Shs.75m/- in January 1999.

Accordingly, notwithstanding the six complex issues framed at the commencement of the hearing of the case, the real issues between the parties had, at the close of those hearings, been drastically narrowed down to the following three only:

(1) whether Plaintiff Bank by taking possession of the mortgaged property under a court order, had thereby realised its security? If so, whether Plaintiff is now estopped from any further claim from Defendants?

(2) whether Defendants are entitled to mesne profits, to be deducted from Plaintiff's overall claim? If so whether the mesne profits amount to Shs.19.2m/-?

(3) whether the First Defendant can be sued jointly and severally with the Second and Third Defendants?

I propose to deal with the above issues as follows.

1. Joint/several liability

Defendants contended that they could not be sued jointly and severally. Only when the principal borrower (the First Defendant) fails to pay, could the Second and Third Defendants (who are guarantors/sureties) be sued jointly with the First Defendant — see **Ahmed Issa Sukri v Kwongiyiki Bank 1990 LRC, at p.335;** see also **Uganda Baati v …**

Plaintiff's response to this contention was that the First Defendant is liable as principal debtor; while the Second and Third Defendants are liable as guarantors under the same deed (Exhibit P.3).

I do not find much difficulty with this issue as framed. Clearly, all Defendants were engaged jointly in one and the same transaction, under which Plaintiff advanced a loan of *Shs.75m/-* to the First Defendant; and the Second and Third Defendants jointly guaranteed that loan by signing a guaranty deed. The guaranty deed was a *demand guaranty* — see clause (1) thereof, which states, in relevant part, that:

> "*... the undersigned hereby guarantee to you the payment of and undertake <u>on demand in writing made to the undersigned by you..</u> to pay to you all sums of money which may now be or which hereafter may from time to time become due or owing to you.. from the principal."*

The legal implications of the above clause are that the guarantors (Second & Third Defendants) undertook to pay on demand by Plaintiff. Plaintiff was not obliged to demand payment from the principal borrower first, before turning to the guarantors. In the instant case, the Second Defendant in his testimony did expressly admit the fact of First Defendant's

default in servicing the loan starting from April 1996, and continuing thereafter to date. He also admitted his own various payments, amounting to Shs.29m/-, towards honouring his guaranty obligation to the Plaintiff. He cannot now be heard to renege on his obligations, by invoking the subterfuge of a misconceived technicality. The Plaintiff was completely free and entitled to sue all three Defendants, separately, or severally and jointly (as he has done). In this regard, Plaintiff is also fully supported by the principle enunciated in 0.1 r.3 of the Civil Procedure Rules ("CPR") — which provides that

> "*All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly or severally...*"

2. Realisation of Mortgagee's security

> Defendants contended that they ceased to be indebted to Plaintiff Bank when this Court ordered vacant possession (as against Second and Third Defendants) in MA 232/97. The effect of the Court order was to hand the suit premises to the Plaintiff, pursuant to 0.34, rr. 3A and 7 of the CPR. This was after Plaintiff had tried, and failed, to auction that property under section 9 of the Mortgage Decree (No. 17/74) — which does not require court intervention. At that time, Plaintiffs claim was for Shs.77,256,162/-. The fact that Court subsequently granted Plaintiff counsel's bill of costs for this same amount, proves that indeed the Court's order in MA 232/97 did recognize the mortgagee's realisation of its security. Accordingly, Plaintiff is now estopped from pressing any further claim against the Defendants. MA 232/97 makes any such further claim, *res judicata.*

In response, Plaintiff contends that the Mortgage Decree permits a variety of mechanisms for a mortgagee (such as Plaintiff in this instant case) to realise his security. These mechanisms include appointing a receiver; taking possession of the mortgaged land; and foreclosure of the mortgage - see sections 2,3,4,5 and 6 of the Mortgage Decree. A fourth and distinct mechanism involves section 9 of that Decree, under which the mortgagee may sell the

mortgaged property by auction or private treaty (without recourse to court) — but subject to that mechanism being reserved in the mortgage deed. In the instant case, that mechanism is specifically reserved in clause 3(B)(i) of the mortgage deed (see Exhibit *P5).* In bringing MA 23 2/97, Plaintiff sought to have vacant possession of the mortgaged property in order to sell the same. Thus, Plaintiff meant to proceed under section 9 of the Mortgage Decree (and not under ss 2(b) and 6 of that Decree).

In my view, this issue turns on both the legal analysis of sections 6 and 9 of the Mortgage Decree, and of other relevant legal provisions; as well as on a proper assessment of the factual situation in this case. As regards the facts of the case, I am fully satisfied that indeed Plaintiffs intended to realise the mortgaged property through **sale.** To facilitate the sale they needed vacant possession, which the Defendants resisted. Thereupon, Plaintiff were obliged to apply to Court by way of an Originating Summons ("OS") under 0.34, rr 3A & 7 of the CPR. The OS states in relevant parts as follows:

> "*... the Applicant has resolved to realise the security by sale of the Mortgage property in accordance with the terms of the Mortgage.*
>
> *THE APPLICANT has applied for the determination of the following questions:-*
>
> *1. Whether the Applicant is entitled to realise the security under the Mortgage...*
>
> *2. Whether the Applicant is entitled to delivery of possession of the Mortgaged property by the Respondents"*

The supporting affidavit to the OS, sworn by the Plaintiff Bank's Company Secretary (Mr. George Luguma) (dated 19/3/97) puts the matter of Plaintiff's intentions beyond any dispute. The affidavit recounts as follows:

> *"7. the Applicant instructed its lawyers M/s Ndozireho & Co. to realise the Mortgage and that they notified the Respondent of their intention to sell the mortgaged property*

and accordingly instructed a Firm of Auctioneers... who advertised the mortgaged property for sale.

10... on 25/11/96, the Applicants' lawyers further instructed M/s Kika Agencies Ltd. to recover the unpaid balance from the Respondents by sale of the Mortgaged property as earlier advertised. The Respondents deposited third party cheque of Shs. 25,000/- payable in the name of one of the Directors Mr. Jamal Muhindo... towards the outstanding amount. The said cheque was dishonoured...

10A THAT despite the fact that Respondents failed to repay the total loan outstanding amount, they refused to hand over vacant possession of the premises to the Auctioneers.

11... the Auctioneers have as a result failed to realise the security as prospective buyers are not willing to take the property encumbered by the Respondents.

12... I swear this affidavit in support of Applicant's Application to Court for determination of issues whether it is entitled to sell the property and to vacant possession thereof "[emphasis added]

The above facts sworn to by Luguma are nowhere controverted nor even challenged by the Respondents. On the contrary, the identical affidavits of Mr. Muhindo and Mrs. Muhindo dated *15/5/98* do expressly concede that:

"2. 1st defendant admits executing the [loan agreement] to secure Shs. 75,000,000/-

3. That upon the 1st defendant breaching the [loan agreement].. Plaint ff/respondent sought to realise the security through sale of the property...

4. *in order to effect the sale of the mortgaged properly, the plaintiff/applicant instituted MA No. 232 of 1997*

5. *The property was thereafter advertised for sale and the account of ft defendant was debited with (shs. 364,000/-) as advertising charges."* [emphasis added]

Furthermore Mr. Muhindo (PW1) stated during his cross-examination that:

> *"I am aware that during Court hearing [of MA 232/97] the was not yet concluded, but the offer was on the table for Shs. 75m/- as by November, 1998 (see Exhibit p15). I have never received any notification of this sale; and have therefore never checked my account with Diamond Trust. They should send me statements anyway. I am still waiting for an accounting from the Bank as to what happened to my mortgaged property.* [emphasis added]

It is evident from the above that PW1 was sure of Plaintiffs intention to sell the mortgaged property. Apart from that, he "never received any notification of this sale". Indeed, he is still waiting for "an accounting from the Bank as to what happened to my mortgaged property". Given this uncertainty and lack of full knowledge on his part, PW1 cannot be heard to speak authoritatively on the nature of the sale of his property. In particular, he cannot claim to have the last word as to whether the sale was for purposes of section 6 (and not section 9) of the Mortgage Decree. His testimony on this - as quoted above - is at best only tentative, that is to say, it is clouded in a mist of uncertainty and ignorance of what really took place.

As against that testimony, Plaintiffs contentions on this particular matter are emphatic and are fully supported and corroborated by documentary evidence - see in particular, Mr. Luguma's affidavit, the newspaper advertisements, and the Originating Summons (in MA 232/97), all of which indicate one and only one intention of the Plaintiff (i.e. to seek vacant possession in order to facilitate easy sale of the mortgaged property).

From all the above, Court is satisfied that, indeed, Plaintiffs sale of the Defendants' mortgaged property was effected under paragraph 3B of the Mortgage Deed and section 9 (not section 6) of the Mortgage Decree. Court is fortified in this conclusion by the fact that as a commercial bank, Plaintiff could not proceed under section 6 of the Mortgage Decree, as any such attempt would be fettered by section 19(1) of the Financial Institutions Statute, which prohibits a financial institution from purchasing or acquiring:

> "*(c)…any immovable property or any right on it except as may be reasonably necessary for the purpose of conducting its business or of housing... its staff but this paragraph shall not prevent a financial institution*
> *(i)* **…**
>
> (ii) *from securing a debt on any immovable property and in the event of default in payment of such debt, from holding such immovable property for realisation at the earliest moment suitable to that financial institution."*

In the premises, Court's answer to this issue of the mortgagee's realization of its security is that by taking possession of the mortgaged property, the Plaintiff Bank did not realise its security in terms of section 6 of the Mortgage Decree. All of Plaintiffs numerous acts referred to above are wholly consistent with section 9 of the Mortgage Decree (and inconsistent with section 6 of that Decree).
The above finding leaves only one last issue in this case, namely: the question of Defendants' entitlement, if any, to rent or mesne profits.

3. Rent/Mesne Profits

> Under this issue, Court needs to determine whether Defendants are entitled to any mesne profits from Plaintiffs; and if so, in what amount? Defendants claim a total amount of Shs. 1 9.2m/- in lost rents for the mortgaged property, calculated at the rate of Shs. 1.2/- to 1.5m/- per month for 16 months: from the date of eviction (3rd

September, 1997), to the date of sale (January 1999). The grounds for their claim are that during those 16 months, the Plaintiffs were or ought to have been realising rentals on the mortgage property.

In response, Plaintiff contended that the vacant possession of September 1997, did not make him an "owner" of the mortgaged property. Equally, that possession was not taken under section 6 of the Mortgage Decree (so as to make Plaintiff liable to account for the property's rents). I do not agree. Plaintiff took possession of the property with the intent to sell. He did not sell until 16 months had passed. Defendants were thereby put into an intolerable position. They were stripped of the property, but then kept in suspense as to the final disposition of the physical possession of their property. They had to seek alternative accommodation for themselves for those 16 months. In the meantime, Plaintiff had possession of the property, but made no accounting at all for the management of that property during those 16 months. Defendants are entitled to that accounting. In this regard, the authorities are very clear. For one, **Jowitt's Dictionary of English Law (2nd Edn., 1977) Vol.** 2 **(at p.1205)** succinctly puts the point, and the underlying principle behind it, thus:

> *"A mortgagee in possession is bound to account to the mortgagor for the rents and profits which he has received or ought with proper management to have received, and is liable for waste. The principle is that he must get no advantage out of the mortgage other than payment of principle, interest and costs, and he is made to account not only for what he has actually received, but also for what he might have received but for his own wilful default or neglect."*

The Defendants in the instant case claim the equivalent in rents, amounting to Shs.1.2m/- to 1.5m/- per month. However, apart from their sheer claim, they have no proof of, nor any supporting evidence for that claim. In the circumstances, Court hereby orders Plaintiffs to account for how they managed the property during those 16 months. Equally, Court also hereby orders the Defendants to prove the amount of the rents that Plaintiffs either did realise

or could have reasonably realised from the property during the said 16 months.

Without both elements, Court is unable to determine fairly and judiciously the claims of each party on the other.

As regards the eventual sale price of the mortgaged property, there is no dispute between the parties as to the price of Shs.75m/-. The dispute is as to whether that was a fair price - or whether (as Defendants contend) the price should have been either Shs.185m/- (per the valuation of 1998 at the time of Plaintiff's taking possession); or Shs. 150m/- (per the insurance value carried on the property at the time of sale). Plaintiff contends that the forced value of the property, at the time of taking vacant possession, was Shs.80m/- (pursuant to the professional valuation done by PW3: Mr. Nsamba Gayiya (Exh. P11). Court finds that the valuation of Shs.80m/- was exactly on the mark. The valuer, an experienced professional in his field, gave testimony (as PW3) in which he listed a catalogue of the poor materials and workmanship of this particular property; the rapid deterioration of that property over the course of three valuations 1994 (Shs.185m1-), 1999 (Shs.90m/-), and 1998 (Shs.80m/-); as well as the generalised depressed property prices in the Buziga area at that time.

Court is satisfied that the sale price of Shs.75m/- was not at all an unfair price. As that price is below the Plaintiff's claim of Shs. 112m/-, Defendants are not entitled to any set off. On the contrary, they are liable to pay the outstanding balance of (112m/- - 75m/-), namely Shs.37m/-. From that figure of Shs.37m/-, Defendants are entitled to set off such amount of rents/mesne profits (for the 16 months September 1998 to January 1999) as they will be able to prove.

In order to enable the Defendants prove their rent/mesne profits, and to enable the Plaintiff render an account of their management of the mortgaged property over the 16 months during which they had physical possession of that property, the Registrar of this Court is hereby directed, pursuant to Order 18, rule 12, sub11 rule 1(b) of the CPR, to carry out an inquiry as to the rent/mesne profits that did accrue, or should have accrued, on the property during that material period. In carrying out this inquiry, the Registrar may engage such professional

services as he may deem desirable. The Registrar shall make a report of his inquiry to this Court within 3 weeks from today.

The costs of this suit are to abide the final decree in this case pursuant to Order 18, rule 12, sub-rule (2) of the CPR.

Ordered accordingly.

James Ogoola

JUDGE

19/06/2002