

THE REPUBLIC OF UGANDA
HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION
HTC-00-CC-MA-317-2005
(Arising from HCT-00-CC-CS-0140-2005)

SHELL KASESE SERVICES LTD
J. W. K. BYAKWAGA
COLLIN BYAKWAGA

APPLICANTS

VERSUS

THE COOPERATIVE BANK LTD
(In Liquidation)

RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE F.M.S. EGONDA-NTENDE

RULING

1. The applicants are seeking unconditional leave to appear and defend the main suit and that costs of this application abide the main suit. The application is brought by notice of motion with the affidavit of Applicant No. 2 in support thereof. The main ground of this application is that the applicants intend to file a cross action against the respondents for having sold the security provided to the respondent at an undervalue, far below its market value, whereas its worth should have satisfied the respondents claim against the applicants.
2. The Respondent opposed this application, filing an affidavit in reply sworn by Mr. Ben Sekabira, an agent of the respondent. The Respondents deny that the security to the loan was sold at an undervalue.
3. Mr. Benard Bamwine, learned counsel for the applicant submitted that the security of the applicant was sold at Shs82,000,000.00 which was an undervalue, given that the 1997 valuation of the said property had put its value at over Shs500,000,000.00. The valuation of the respondents put the market value of the security at Shs132,000,000.00 which was

so out of range with the 1997 value. The applicants valuation report records the built up area to be 1462 square metres whereas the respondent valuation records the built up area as slightly over 1000 square metres. This raises a triable issue for which the applicants should be granted unconditional leave to appear to defend.

4. Mr. Mathias Sekatawa, learned counsel for the Respondent, submitted that this application raised no triable issue. The question of whether the sale of the security was at an undervalue is matter that can only be tried in a separate action for damages. This must be brought by originating summons only. Secondly Mr. Sekatawa argued that admission had been made of the amount owing to the Respondent from the applicants. If leave were to be granted it should be conditional upon payment of the amount admitted.
5. No authority has been drawn to my attention that bars the bringing of a cross action against the plaintiff in respect of damages for selling property as security at an undervalue. The applicant has argued that had the respondent acted properly, the sale of the security would have resulted in payment of the whole outstanding debt to the plaintiff/respondent. Each party has submitted a valuation report of the security in question, and it is clear that there is a conflict between the two reports on both the market value of the security and consequently the forced sale value, and on the area of the built up areas of the security. The difference in the built up area is approximately 0.344 Square Metres.
6. I am satisfied that triable issues are raised upon these matters which cannot be resolved without a trial. And indeed the question of whether the respondent in selling the security did so at a reasonable price is one that can only be settled after a trial of all issues connected thereto. As it is contended that the sale ought to have realised the outstanding amount, and more, there exists a cross action that would offset the whole of the plaintiffs claim.
7. In the circumstances I will allow the applicant's application for unconditional leave to appear and defend the main suit. The written statement of defence shall be filed within 10 days from the date hereof. Costs shall abide the outcome of the main suit.

Dated at Kampala this 18th May 2005

FMS Egonda-Ntende
Judge