

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0496 OF 2003

NATIONAL BANK OF COMMERCE LTD :.....
PLAINTIFF

VERSUS

1. SAAD TRADING CO. (1991) LTD]
2. SAAD HAJI MIGDAD]
3. JAMAL M. SAAD] :.....
DEFENDANTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU
BAMWINE

J U D G M E N T:

The Plaintiff's suit against the Defendants is for recovery of Shs.19,920,000-, interest and costs. From the records, sometime in February 2002, the Plaintiff granted to the 1st Defendant an overdraft facility of Shs.35m. The overdraft was for one year. The Defendants secured the loan with a mortgage over 2 Plots of their land in the city. They held a lease interest in that property. The 1st Defendant defaulted in repaying the loan and the debt accumulated to Shs.45m. The Plaintiff then exercised its right to sell the mortgaged property. The sale fetched a sum of Shs.25m. This suit is for the recovery of the said balance on the principal sum.

The Defendants have contested the suit. They claim that the sale was grossly undervalued and/or that the Plaintiff did not attempt to obtain the true market value of the property which would have off set the loan.

When the case came up for hearing, both parties were of the view that the nature of the case did not require adducing of oral evidence. They opted for written submissions. Two issues were framed for determination:

1. Whether before the sale of the mortgaged property the Plaintiff attempted to obtain the true market value of the property that would have offset the whole loan.
2. Whether the Plaintiff is entitled to the suit sum.

The thrust of the Defendant's case as regards the sale is that in selling the two plots the Bank had a duty to act in good faith and to take reasonable steps to sell them at the true market value or the proper price prevailing at the time of sale. I take this to be the correct position of the law.

The leading authority is **Cuckmere Brick Co. Ltd -Vs- Mutual Finance Ltd [1971] 2 All ER 633.**

In that case the mortgagee exercised the power of sale and sold the property by auction. In the advertisement of the property for sale, the auctioneer

failed to describe that there was in existence in relation to the property a planning permission for 100 flats. This was drawn to the attention of the mortgagee before the sale, but they nonetheless proceeded with the sale and their auctioneers merely mentioned this fact at the auction. The property was sold for 44,000 pounds and the mortgagor alleged that the true market value was 75,000 pounds. The trial Judge held that the mortgagee had failed in their duty and assessed the true market value to be 65,000 pounds. On Appeal, the Court of Appeal dismissed the Appeal as regards the breach of duty of the mortgagee (but ordered an inquiry on the question of damages). In the course of his Judgment, Salmond LJ said (at P. 643):

“It is well established that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Provided none of those adverse factors is due to any fault of the mortgagee, he can do as he likes.”

I need not say more on the above. The message is very loud and clear. Salmond LJ then discussed the question whether a mortgagee in exercising the power of sale was also under duty at the time of sale to take reasonable care to obtain the true market value of the property to be sold, and he said (at P. 644):

“Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take no reasonable care to obtain what I call the market value at the date of the sale.”

And finally he concluded thus (at P. 646):

“I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain a true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.”

Cross LJ, another member of the Court, said (at 646-647) that the sale must be a genuine sale by the mortgagee to an independent purchaser at a price honestly arrived at. He added that a mortgagee is liable in damages to the

mortgagor for negligence either of the mortgagee or his agent in connection with the sale. Cairns LJ, the 3rd member of the Court, held (at 654) that the mortgagee has a duty to take reasonable steps to obtain the proper price in the interest of the mortgagor. The decision in Cuckmere has been followed in this country in **Mubiru -Vs- Uganda Credit & Savings Bank [1978] HCB 109.**

The Defendants have complained that the Plaintiff did not sell the plots at the best price then available. I have already indicated that no oral evidence was adduced in this matter. I must therefore decide it on the strength of available documents.

The Defendants were in default and in consequence of that default, the bank was entitled to sell the security. It sold the same in exercise of that right. The Defendants now contend that the Plaintiff had failed to exercise their duty of care towards them by selling the plots at an under value. In such event, the burden rests upon the Plaintiffs to show that they are entitled to the balance on the mortgage loan. Likewise, the Defendants must show that the price at which the plots were sold was not true market price or the proper price at the time of sale.

There is no doubt in my mind that the property was in a poor state at the time of sale. But this did not happen over night or even during the pendency

of the mortgage. Before the Plaintiff committed its money to the Defendants, the property was in this poor state.

The business of lending money itself entails risks. However, in my view, considering the dilapidated nature of the property at the time of the valuation and the fact that the borrower's lease was left with less than 3 years to expire, the Bank assumed an unnecessary high risk for such a hefty sum of money. But that's how the parties wanted it. It is not necessary for me to interfere with their bargain.

I now turn to the sale itself. First, the advertisement. The property was advertised in the New Vision of November 14, 2002. There is no evidence of the detailed offers received. The Defendant's complaint in this regard is that once the mortgagee decided to advertise the property for sale, he had to give it adequate publicity in order to attract as many potential bidders as possible. I agree with that argument. It is inline with the position in the Cuckmere case, *supra*, and **Tse Kwong Lam -Vs- Wong Chit Sen [1983] 3 All ER 54**. In the latter case the advert was placed in 3 Newspapers and appeared on 3 occasions. In the instant case, the advert appeared in only one Newspaper (New Vision) and only once. The size of the advert was small at p.5 of the paper. I got the impression that the property was inadequately advertised. The Plaintiff is a Bank with presumed means to afford a

reasonable number of advertisements prominently placed in Newspapers. I think the Plaintiff earns no credit for that lapse in Judgment.

Secondly, it is argued that the property was not given a full description so as to raise interest in potential buyers. From the advert, the property was merely described as LRV 376 Folio 14 plot 237 at Mengo Kisenyi and LRV 371 Folio 6 plot 238 at Mengo Kisenyi. It is stated in the main body of the advert that the property would be sold with full improvements and developments thereon. No indication as to what those improvements or developments were. This was property in down town city. A description of it as suitable for commercial or residential purposes would in my view have made a difference. It would most likely have aroused interest of the big property developers in the city. I'm inclined to accept the argument that the advert was too brief to arouse interest of potential buyers.

Thirdly, it has been argued that the 14 days notice was too short for any meaningful bids. May be it was, may be it was not. As Lord Templeman said in Tse Kwong Lam's case, supra, a procedure which is appropriate for the sale of second hand furniture is not necessarily appropriate for the attainment of the best price for free hold or leasehold. I have not formed any definite opinion on this point because after all the sale did not take place on 28/11/2002 as advertised. But I'm certainly persuaded by the argument that the mortgagee and/or its agent, the auctioneer were negligent in the way

they advertised the mortgaged property. In my view, if the property had been given a wide publicity, had been described in the advert in greater detail and had given potential buyers time to inspect and make bids, the property could have fetched a little more money.

As regards the sale itself, there is evidence that it was supposed to take place on 28/11/2002 before an auctioneer. The auctioneer has not given evidence, by affidavit or otherwise, but according to a letter, P. Exh. 9 dated 28/1/2003, the sale he had managed to arrange hit a snag when the Landlords rescinded their offer of renewing the lease on the said lands and as such the buyer they had got pulled out of the deal as it was no longer viable. The auctioneer then gave what I consider to have been appropriate advice to the mortgagee:

“Start considering other ways of making the loan defaulters to pay as we cannot sell the securities with that time left on the lease.”

I have considered this to have been appropriate advice because this would have been the right time for the mortgagee and the mortgagor to reflect over the security and together determine the way forward. There is no evidence of the advice being followed up. Rather, from the records, the property was never auctioned. What we have on record next after the position stated in P. Exh. 9 is a letter from the auctioneers to the Plaintiff, P.

Exh. XI, indicating a received offer of Shs.5m. There is no evidence of the Plaintiff responding to that offer. Then on 28/3/2003 Kalungi Estates Ltd offered Shs.1m for the 2 plots directly to the Plaintiff and on 7/5/2003 took the 2 plots for Shs.25m. It is significant to note that plot 238 had been given a current open market value of Shs.50m and a forced sale mortgage value of Shs.30m on February 15, 2002.

There is no evidence of the property being re-valued to raise inference that the sale was in line with that re-valuation.

From the evidence, the sale was by private treaty, organised by the Bank itself. There was no competitive bidding. The Plaintiff may have been free to conduct the sale in the manner determined by itself but the evidence before Court does not show that the Defendants were even aware of what was going on to raise inference that they consented to meet the short fall on the mortgage loan after the sale. The Plaintiff owed a duty to the guarantors, 2nd and 3rd Defendants, since they are liable to the same extent as the first Defendant, to know what was going on if the Plaintiff's intention was to make them pay the difference between the purchase price and the mortgage debt. The legal position is that if it should appear that the mortgagee or the receiver has not used reasonable care to realise the assets to the best advantages then the mortgagor, the company, and the guarantor are entitled in equity to an allowance. They should be given credit for the

amount which the sale should have realised if reasonable care had been used: **Standard Chartered Bank Ltd -Vs- Walker & Anor [1982] 3 All ER 938.**

In the instant case, the valuation done at the instance of the Defendants in respect of plot 237 did not give the forced sale mortgage value of that plot. The report gave Shs.20m as the current unencumbered open market value of the plot. It was some estimate by some obscure registered surveyor, Lucy U. Kabege. In spite of that glaring omission in the valuation report, the Plaintiff unwittingly accepted and acted on it. The other report in respect of plot 238 was authorized by Associated Consulting Surveyors of Stephen H. Bamwanga. It gave it the forced sale mortgage value of Shs.30m. The amount realised from the sale of the 2 plots was less than the estimated forced sale mortgage value of one plot by Shs.5m. Taking Mr. Bamwanga's assessment of Shs.50m to reflect the open market value and Shs.30m the forced sale mortgage value, this gives a ratio of 5:3. Doing the best I can, I would take the likely forced sale value of plot 237 to be Shs.12,000,000-, that is, 3/5 of the current market value of Shs.20,000,000-. This means that the forced sale value for the 2 plots could utmost be Shs.42,000,000-. The debt was Shs.45,002,572-.

For the reasons stated above, I have come to the conclusion that the Plaintiff did not obtain the true market value of the property and that even if it had done so, the proceeds would not have offset the loan.

As to whether the Plaintiff is entitled to the suit sum of Shs.19,920,000-, I think it is not. The Plaintiff accepted to risk its money in the manner I have already described herein above. In my view, the Defendants' liability to the Plaintiff, jointly and severally, ought to be in the difference between the amount the property would have fetched if the Plaintiff had used reasonable care to realise the assets to the best advantage, that is, Shs.42,000,000-, and the mortgage debt at the time, that is, Shs.45,002,572-. This difference is Shs.3,002,572-.

I enter Judgment for the Plaintiff against the Defendants in the sum of Shs.3,002,572-. It shall have accruing interest of 25% per annum as prayed from the date of filing till payment in full. In view of the Defendants' partial success, the Plaintiff shall have half the taxed costs of the suit. I so order.

Dated at Kampala this 11th day of July, 2005.

Yorokamu Bamwine

J U D G E

