THE REPUBLIC OF UGANDA

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

IN THE MATTER OF THE VOLUNTARY WINDING UP AND LIQUIDATION OF AFRICAN TEXTILE MILL LIMITED

HCT-00-CC-CI- 20 OF 2005

[RELATED TO HCT-00-CC-CS-0104-2002 AND HCT-00-CC-CS-0257-2005]

AFRICAN TEXTILE MILL LIMITED
(IN LIQUIDATION) ::::::::::::::::::::::::::
APPLICANT

VERSUS

CO-OPERATIVE BANK LIMITED
(IN LIQUIDATION) ::::::::::::::::::::::::::::
RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

R U L I N G :

This is an application under sections 229, 301(1), 305 and 308 of the Companies Act, Cap 110 and other enabling laws. The Applicant is seeking determination of some questions arising from the winding up. The liquidator wants to know, for instance, whether it is lawful and justifiable for the

Respondent to enforce its mortgage during the liquidation of the Applicant company and whether or not it is lawful for the Respondent, having submitted to the jurisdiction of Court in the civil suits to which this application relates can enforce its rights under the mortgage in respect of the mortgaged property.

From the records, the suit property was mortgaged to the Respondent under 3 registered instruments for a sum of Shs.1,200,000,000-. The Applicant defaulted on its repayment obligations. The Applicant is said to be indebted to the Respondent in the sum of Shs.1,323,401,196-. The Respondent has now taken steps in accordance with the mortgage instruments to realise its security. It is now in possession.

From the pleadings, each side has filed its own questions for determination. This was not necessary since the Applicant is the one desirous of being guided by this Court. The Respondent could still have been heard on the matter without setting its own issues and seeking to answer them. For the sake of orderliness, I will dispose of the matter basing myself on the concerns raised by the Applicant. I believe this will also directly or indirectly answer most of the concerns raised by the Respondent. Needless to say, since the Respondent has raised a preliminary point of law, it ought to take centre stage first.

The point of law relates to the propriety of these proceedings. The action is brought, among other laws, under the provisions of S.305 of the Companies Act. It provides:

> *"(1). The liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding up of a company, or to exercise as respects the enforcing of calls or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court."*

There is no doubt that the person seeking guidance herein is the liquidator. The liquidator is one CLIVE MUTISO and yet the Applicant herein is AFRICAN TEXTILE MILL LTD (ATM) IN LIQUIDATION. The section applies to the liquidator, any contributory or creditor. The Applicant is none of the above.

Mr. Karugaba has submitted that a distinction should be made between actions properly belonging to the company and those that can be brought by the liquidator. This submission cannot be assailed. In as far as Court is concerned, ATML is in liquidation. It has technically ceased to carry on any business. Its fate lies in the hands of the liquidator who must determine the way forward in as far as the winding up process goes. In the process, he has encountered some issues relating to the winding up process over which he requires answers. This must be differentiated say from a situation where the company itself is pursuing a legal right vested in it. In such event the

company uses its available legal resources and gets the matter right or wrong. It is noteworthy that he was appointed at an extra-ordinary meeting of the members of the company. As such, he is not regarded as an officer of the Court. But under S.305 of the Companies Act, he can access Court for guidance. Since the Applicant is neither the liquidator, a contributory or a creditor, I hold as I must that the action was not properly brought.

This would ordinarily have brought the matter to the desired end. However, trusting as I do that equity looks to the intent rather than the form and that equity will not suffer any wrong to be without a remedy, I will proceed to address some of the concerns raised by the Applicant.

From the records, there has been a long battle between the Applicant and the Respondent over the mortgaged property. It is evident from the pleadings that the Respondent is in possession and control of the suit property since 31/5/05. That's the status quo.

From the pleadings also, the factory is closed. The workers were sent home. It is immaterial as to who did so because one of the consequences of voluntary winding up is that it terminates contracts of employment. Now if the company is closed, there is no business to transact other than the winding up process. And this brings me to the thrust of the dispute between the parties, that is, whether the Plaintiff as the mortgagee should be

restrained from exercising its contractual rights on account of the winding up process. On this point, I can do no better than re-echo the words of the learned author, William James Gouch, Company Charges, 2nd Edn at P. 949 on "Security Proprietory Interest."

"As in bankruptcy, a secured creditor in company liquidation can at his option effectively stand outside the liquidation altogether or come into the liquidation and prove. The nature of the election of a secured creditor was described in **Food Controller –Vs- Cork [1923] AC 647** (at 670 – 671) by Lord Wrenbury:

'The phrase "outside the winding up" is an intelligible phrase if used, as it often is, with reference to a secured creditor, say a mortgagee. The mortgagee of a company in liquidation is in a position to say "the mortgaged property is to the extent of the mortgage my property. It is immaterial to me whether my mortgagor is winding up or not. I remain "outside the winding up" and shall enforce my rights as a mortgagee."

This is to be contrasted with the case in which a creditor prefers to assert a right, not as a mortgagee, but as a creditor. He may say, "I will prove in respect of my debt." If so, he comes into the winding up."

I wouldn't agree more with the learned author.

From the records, the Respondent is doubly assured. It can enforce its rights as a mortgagee as well as a Judgment creditor. In my view, its election to realise its security and discharge the secured debt out of the sale proceeds as far as possible cannot be faulted. The Applicant must come to grasp with the reality if the company assets are to be protected from further waste through costly and unwarranted suits. It is the considered view of the Court that it would be honourable for the liquidator to leave the mortgagee to realise the security as by law established. It appears that the liquidator harbours the feeling that the Respondent may not conduct the sale in the best way possible. Such a feeling is natural but unwarranted. True, a morgagee 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: **Cuckmere Brick Co. Ltd –Vs-Mutual Finance Ltd [1971] 2 All ER 633.** But the law is not short of remedies if the mortgagee messes it up. The sale must be a genuine one by the mortgagee to an independent purchaser at a price honestly arrived at. The mortgagee is liable in damages to the mortgagor for negligence either of the mortgagee or his agent in connection with the sale. He has a duty to take reasonable steps to obtain the proper price in the interest of the mortgagor.

In view of these legal safeguards, the liquidator's suspicions would be groundless. Having stated so, I reiterate that normally, when land is

mortgaged, the mortgagor remains in actual possession of the property until upon default when the mortgagee finds it necessary to enter into possession. The mortgagor retains the legal fee simple in respect of the mortgaged premises and the mortgagee takes a charge by way of a legal mortgage and in law he has the right to possession.

It was so held in **Mubiru –Vs- Uganda Credit & Savings Bank [1978] HCB 109** and there is no reason for me to depart from that position. This right must be exercised unequivocally by demand, notice to tenants or entry into the premises. This Court is satisfied that notice was issued to the Applicant in 2002. It was still in force by the time the mortgagee took possession. Now that the mortgagee is in possession, the liquidator would better work hand in hand with the Respondent to reap maximum advantage from the sale of the assets.

In short, it is lawful and justifiable for the Respondent to enforce its mortgage during the liquidation of the Applicant company. It is also lawful for the Respondent, having submitted to the jurisdiction of the Court in the 2 civil suits to which this application relates, to enforce its rights under the mortgage in respect of the mortgaged property. Put differently, the Respondent being a secured creditor is entitled to stand outside the winding up process and enforce its mortgage rights.

Finally, it is the advice of this Court that the provisions by which actions and other proceedings against a company may be stayed in respect of a compulsory winding up do not apply to a voluntary winding up, although the Court has discretion to stay proceedings. See COMPANY LAW IN UGANDA by D.J. Bakibinga at p. 447.

There is no basis for the exercise of such discretion in this case.

Accordingly, the Applicant is not entitled to any of the reliefs claimed, both as a matter of procedure, having wrongly instituted the suit in the name of the company in liquidation, and as a matter of law. Save for the guidance which I hope he will find useful, I would dismiss the application with costs to the Respondent. I do so.

Dated at Kampala this 13th day of July, 2005.

Yorokamu Bamwine

J U D G E