

REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-CS-0140-2005

THE COOPERATIVE BANK LTD
IN LIQUIDATION

PLAINTIFF

VERSUS

SHELL KASESE SERVICES LTD
JOHN W BYAKWAGA
COLLIN BYAKWAGA

DEFENDANTS

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGMENT

1. The plaintiff brings this action to recover from the defendants the sum of Shs.239,893,137.00, interest at 21% per annum from the 1st November 2004 till payment in full, and costs of this action. The defendant No.1 was a customer of the plaintiff bank. It sought and obtained a loan from the plaintiff of Shs.200,000,000.00 in June 1997. It secured the said loan with a mortgage over Leasehold Register Volume 2050 Folio 25 Plot 68, Rwenzori Road, Kasese, and personal guarantees by defendants' no.2 and no.3.
2. Upon default by the defendant to pay the sums due and owing to the plaintiff, the plaintiff exercised its rights of sale over the mortgaged property, and sold it for Shs.82,000,000.00. The defendant no.1 made a further payment of Shs.14,000,000.00, leaving a balance of Shs.239,893,137.00. The plaintiff has demanded this sum of money from defendants no.2 and no.3 in vain, hence this action.
3. The defendants oppose this action and filed a counter claim for Shs.398,134,395.00, interest at 25% per annum from the date of sale till satisfaction in full, or in the alternative, payment of special damages being the value of the mortgaged property, on 30/06/2003, the date of sale, less shs.101,865,605.00 being the outstanding loan as of 19/05/1999, the day of the closure of the plaintiff plus interest at 25% per annum from

the date of sale till full satisfaction. The defendants further seek general damages and costs of this action.

4. The defendants contend that there was default on the part of the defendants before the banks sudden closure on 19/05/1999. The defendants further contend that the sale of the security herein granted was in bad faith in so far as it was sold at a ridiculously low price of Shs.82,000,000.00 given its value of Shs.500,000,000.00 in 1997. Secondly that an area of 345 square metres of built up area was excluded in the Valuation Report upon which the plaintiffs relied on at the time of sale. The defendant proposes to set off so much of the sums counterclaimed as wholly extinguish the plaintiff's claims against the defendant.
5. At scheduling the parties agreed upon the following issues. (i) Whether the property mortgaged to the plaintiff was sold at an under value; (ii) How much money was paid by defendant no.1 towards the debt; (iii) Remedies.
6. Plaintiff called two witnesses and the defendant called one witness, in addition to the documents that were admitted at scheduling for each side without objection by the other side. I address the principle upon which these documents are admitted and their evidential value later on this judgment.
7. PW1 was Benedict Ssekabira, the Liquidator of the plaintiff, on behalf of Bank of Uganda. He testified that at the time the suit was filed, June 2003, Shs217,851,085.00 was outstanding. This amount continues to attract interest at 21% per annum. This loan was secured by a mortgage on LRV 2050 Folio 25 Plot 68 Rwenzori Road, Kasese, Motor Vehicle Registration No. 971 UAI and the personal guarantees of defendant no.2 and no.3. The mortgaged land was advertised for sale on 19/08/2002 in the New Vision newspaper. The sale realised only Shs.82,000,000.00 which was the highest offer of two bids received.
8. In cross examination PW1 admitted being aware of Exhibit D1, the valuation report by Associated Consulting Surveyors of May 1997, which put the market value of the security to Shs.500,000,000.00. The valuation by Bageine and company put the market value of the property at Shs.132,000,000.00 and forced sale value at Shs.80,000,000.00. This report did surprise the witness. He took it at its word as it was done by professionals. The bank was closed in 1999 and at the time Shs.167,795,905.00 was owing. There was

interest due on it as agreed between the parties. Since June 2003 the defendants had not paid anything towards to the debt.

9. A statutory notice was issued to the Registered Proprietor, Atyaba Agencies Ltd at PO Box 8 Kasese with a second notice sent to Shell Kasese on the same address.
10. PW2 was Shem Bageine, a valuation surveyor working with Bageine and Company. He is a registered surveyor with the surveyor's registration board. He is a fellow of the Institution of Registered Surveyors of Uganda and Kenya. His firm was instructed to carry out a valuation of Plot 68 Rwenzori Road, Kasese and advise on its current market value and forced sale value in June 2001. He personally travelled to Kasese, inspected the property, carried out physical measurements of the building, obtained information on the rent being paid by tenants and took photographs of the property. He wrote a report on the property, Exhibit P1.
11. The current market value assigned to the property was Shs.132,000,000.00 and forced sale was Shs.80,000,000.00. He used an investment basis for valuing the property, given that any buyer of the property would be interested in the income the property would fetch. The valuation was based on the rental value of the building which was Shs2,110,000.00 per month. This rental value was in line with rental value of similar properties in Kasese at the time. He was of the opinion that a market value of Shs.500,000,000.00 was not a realistic value for a property of this nature in Kasese. It was an overstatement of the value of the said property. It would imply that an investor was prepared to get a return of only 4% on capital investment. No investor would put his money on a property in Kasese to receive only a return of 4% on his investment.
12. On a review of the report by Associated Consulting Surveyors, it is not clear which method was used, though it would appear it was the depreciated replacement cost that was used to arrive at a figure of Shs500,000,000.00. It was not possible to use more than one method of valuation. In his opinion this was the inappropriate method to use on a property of this nature in Kasese which had rather poor prices, prices lower than the cost of putting up such buildings. He testified that depreciated replacement cost is suitable for unique properties that do not generate income or are not normally exchanged on the market or properties built for owner occupation and not for income.

13. In cross examination he admitted that there was a difference in the built up area that is provided in his report compared to Exhibit D1. The major difference was on the residential unit, which, in Exhibit D1, was put at 448 square metres, compared with 223.7 square metres measured by the witness. He could not understand this difference, and would be prepared to re-measure should he be instructed to do so. The difference with regard to main block he ascribed it to the fact that he did not include the pedestrian walkway in the measurements. This did not impact on the value of the property since the value was based on rental income of the premises.
14. DW1 was John Byakwaga, defendant no.2, who was the Managing Director of defendant no.1, and Atyaba Agencies Ltd, the registered proprietor of mortgaged property. He testified that he did not deny the loan. His complaint was that his security had been sold at a cheap price. According to an earlier valuation he commissioned before he got the loan the property was valued at Shs.500,000,000.00. He did not fail to pay. The building was sold while he was paying. If he had been given an opportunity he would have sold the building at a higher price than the price it was sold at.
15. DW1 further testified that he did not recall receiving the statutory notice. He did not receive the statutory notice. He had a post office box in Kasese. This was PO Box 8 Kasese. It is no longer his box. He stopped owning this address when his business collapsed. At the time the building was sold it was no longer his box. He does not recall notifying the bank of the change of address.
16. Much as he was unable to read small letters when he was shown Exhibit D1 he stated that he submitted it to the bank before he got the loan. The bank therefore was satisfied that it could realise its money from this building. He did not agree with the bank valuations. The building would have realised at least Shs.350,000,000.00, if sold. He prayed that this court should consider his case given that he would have sold his building for more than Shs.80,000,000.00. And that was the close of the case for the defence.
17. I now turn to consideration of the evidence and issues in this case. But before I do so, I wish to first make some remarks upon the principles that will guide me in reviewing documentary evidence submitted by the parties in evidence without objection by either party. These were three documents by the plaintiff, Exhibits P1, P2, P3 and one by the defendant, Exhibit D1. I do not take the admission of these documents at the scheduling

stage to mean that each side agreed with the contents or the evidential value thereof. The consent is to admission of the document into evidence, and not admission of the truth of its content. At this stage what the parties dispense with only, unless by specific agreement indicated in the agreed facts portion of the scheduling conference proceedings the parties have otherwise agreed, is the duty to prove the making of the documentary evidence. Dispensation of proving a document is intended to expedite the proceedings by saving on time, and moving the dispute to the actual substantive issues in dispute.

18. For instance in this particular case each side consented to the admission into evidence of a surveyor's report in support of its case. This did not amount to an admission of the contents of the documents or that the evidential value of the same is not contested. The contents of these two documents in fact could be said to be in opposition to each other, and in support of the side that had submitted them. The evidential value of such documents remains in issue, together with all the evidence adduced in the case, and witnesses may be subjected to vigorous cross examination on such documents and its contents, to determine the veracity and or creditworthiness of the same.
19. No admission is made at this stage to the contents of such documents as facts not contested in the case. The only facts agreed upon are the facts the parties specifically mention as facts agreed upon by the parties.
20. I now turn to the first issue. And that is whether the mortgaged property was sold at an under value. The defendant in his written submissions puts forth five grounds upon which this court should find that the mortgaged property was sold at an under value. Firstly it is submitted that the plaintiff accepted in 1997 when it granted the loan that the value of the property was Shs.500,000.000.00 and therefore it is estopped many years later from claiming that the value thereof was Shs.132,000,000.00. Secondly, PW2 admitted that his valuation report differed from Exhibit D1 on the basis of the different valuation methods in either report. The defendant was entitled to pick the valuation method that produced the best price for its property.
21. Thirdly, PW2 was bound to arrive at an under value, given that he under-measured the built up area of the property by 345 square metres. This was deliberate to produce a low value of the property to support a pre determined value by the plaintiffs. Fourthly, the comparison of the value of the sale of Margarita Hotel with the property in this case was

out of place as the PW2 was not involved in the sale of Margarita Hotel, and is not aware of the factors that gave rise to the price for which it was sold. Likewise the comparison of the size of Bugolobi flats with flats in Kasese should be ignored. Fifthly the defendant was not afforded an opportunity to participate in the sale of the mortgaged property. And no proof of service of statutory notice was produced in the evidence.

22. The plaintiff's counsel in his written submissions submitted that what had to be determined was what duty was imposed upon the mortgagee in selling the mortgaged property, and to determine if the plaintiff had performed such duty. Reference was made to Cuckmere Bricks Co versus Mutual Finance [1971] 2 All ER 633. All that the plaintiff had to do in this case was to advertise the property in a leading newspaper which he did. That property had to be valued prior to the sale, as it was done with Exhibit P1. Lastly it had to obtain bids at the auction, accepting one that exceeds the forced sale value of the property. And this is what was done in this case. Bad faith that was alleged by the defendant was denied, and there is no basis for finding the same. The evidence in the case was reviewed and it was submitted that the property in question was not sold at an under value. Reference was made to Waring (Lord) v London and Manchester Assurance Co. Limited and others [1934] ALL E R 642 in support thereof.
23. Having heard all the evidence in this case, counsel's address with regard to the law, and on a review of the law in question in this regard, I find that perhaps the wording of the first issue was rather unfortunate. Selling mortgaged property at an under value, without more, is not necessarily wrongful, unless bad faith, fraud or negligence can be proved, on the part of the mortgagee, or its agents. I take it that what parties intended in agreeing to this issue framed as it was, was that they meant to contest whether the mortgaged property was sold at such a gross under value, the sale price being so low, as to amount to evidence of fraud, or bad faith on the part of the mortgagee.
24. I agree with the submissions of learned counsel for the plaintiff that at this stage it is important to determine what are the duties of a mortgagee exercising the power of sale. And whether those duties have been complied with or not, in order to determine whether the property in question was sold at an under value as would either entitle the registered proprietor to be compensated in damages or cancellation of the transfer of the property.

25. The law applicable to this area was stated by the Court of Appeal for Eastern Africa (on appeal from Uganda) in *Yosiya Sajabi v Musa Umar Amerliwalla and Matia Wamala* Civil Appeal No. 72 of 1955, (1956) 23 EACA 71. Briggs Ag.V P, stated as follows:

‘The English rule that, although a mortgagee in selling is not a trustee for the mortgagor, he must sell in good faith and at a reasonable price than he knows to be obtainable. It also, I think, leads to the conclusion that, if the mortgagee acts in secret and conceals what he is doing from the mortgagor, he may expose himself to some suspicion of not having acted in good faith.’

26. The English rule is restated in *Cuckmere Brick Co Ltd and another v Mutual Finance Ltd* [1971] (2) All ER 633 at page 644 by Salmon LJ., in the following words,

‘ It is well settled 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. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee’s interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor.’

27. Salmon, LJ., continues on to say with regard to the duty of care to obtain a reasonable price,

‘It is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory. There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that, in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it: compare, for example, *Kennedy v de Trafford* with *Tomlin v Luce* ((1889) 43 ChD 191 at 194). The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law.

Approaching the matter first of all on principle, it is to be observed that if the sale yields a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor. If the sale shows a deficiency, the mortgagor has to make it good out of his own pocket. The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee. The proximity between them could scarcely be closer. Surely they are ‘neighbours’. 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 reasonable care to obtain what I call the true market value at the date of the sale. Some of the textbooks refer to the ‘proper price’, others to the ‘best price’. Vaisey J in *Reliance Permanent Building Society v Harwood-Stamper* ([1944] 2 All ER 75 at 76, 77, [1944] Ch 362 at 364, 365), seems to have attached great importance to the difference between these two descriptions of ‘price’. My difficulty is that I cannot see any real difference between them. ‘Proper price’ is perhaps a little nebulous, and ‘the best price’ may suggest an exceptionally high price. That is why I prefer to call it ‘the true market value’.

28. It is the duty of the defendant who is the counter claimant on issue number 1, whether the mortgaged property was sold at such a gross under value as to afford the defendant a remedy, to prove its claim on a balance of probabilities. The defendant must prove that the plaintiff sold the mortgaged property either in bad faith or with such negligence as to entitle the defendant to a remedy. The written statement of defence and counter claim allege bad faith on part of the plaintiff, and not negligence. Therefore it is the bad faith ground that we shall proceed with under this head.
29. It is the duty of the defendant to prove bad faith on the part of the plaintiff. The defendant's counsel in his written submissions put forth 5 grounds. Firstly that the plaintiff, having accepted Exhibit D1 in 1997 in which the market value of the mortgaged property was put at Shs.500,000,000.00, it was now estopped to accept and act on another valuation which placed the value of this property at a substantially lower value than the value in exhibit D1.
30. I do not think this is correct in anyway. Values are not static. The duty of the mortgagee is to offer the same for sale in an open and transparent manner. To paraphrase Salmon, LJ., above there is nothing to prevent a mortgagee from accepting the best bid possible at an auction even if the auction is poorly attended or the bid price is very low.
31. Secondly the defendant argued that the valuation methods in Exhibit D1 and Exhibit P1 were different given the evidence of PW2, and that the defendant was entitled to pick the most favourable method to determine the market value of his property. In my view the defendant has no such choice in the matter. It isn't a question of each party picking whatever method of valuation it wishes. The valuation reports aid those who commission them for a particular purpose. In this case for the plaintiff it was to aid it assess the market value and forced sale value of the property in question. For the defendant it was to aid it obtain a loan from a financial institution.
32. In the explanation of PW2 the depreciated replacement cost was inappropriate to obtain the true market value of a business premise in Kasese and he gave his reasons for saying so. His reasons as to why a depreciated replacement cost method was not the appropriate method for valuing the property in question were not challenged in cross examination. Neither was contrary expert evidence adduced on the matter. The author of Exhibit D1

did not testify to defend his approach. I found the evidence of PW2 persuasive in this regard, and I do not accept that the depreciated replacement method was the correct method of valuation to determine the market value of a business property in Kasese.

33. Thirdly the defendant contends that whatever method of valuation used by PW2 was bound to arrive at a wrong value of the property, given that he under measured the built up area of the property. And that the plaintiff acted in collusion with PW2 to produce an under value of the property in question. It is true that there was a discrepancy in the size of the built areas in exhibit P1 and exhibit D1. PW2 testified that he had physically measured the properties in question, and could not account for the discrepancy on the residential units block. With regard to the main block, he stated that he had not included the covered pathway, veranda and canopy, and that explains the difference between areas of the main building in his report, and in exhibit D1.
34. I accept the evidence of PW2 that he travelled to Kasese and measured the premises. He has annexed to his report photographs of the premises. There is no evidence to contradict him that he visited the site and made the measurements that he did, save for Exhibit D1, whose author did not testify. And it was not that the author was not available in Uganda. A specific adjournment was allowed to give the defence an opportunity for the author to testify. The author did not turn up in court. I accept the measurements PW2 provided in his report with regard to the residential block as the correct measurements.
35. With regard to the difference on the main block PW2 explained how the difference probably arose. Is this difference evidence of bad faith on the part of the plaintiff or PW2? PW2 explained that since this was a public walkway he did not think it necessary to include it in the measurements. The defence suggests that this was evidence of collusion between PW2 and the plaintiff to under value the property. PW2 stated that the omission of this area of about 32 square metres did not affect the value of the premises, given that he used the actual rental income from the premises to value the premises, using the investment basis method.
36. Again, I accept the explanation of PW2 with regard to the value of the mortgaged property, being the same regardless of the failure to include the area of the veranda and canopy. It would have been better though that the area of veranda and canopy were included in the measurement of the built up area of the main block, as the veranda and

canopy were part of the main block. Taken alone or with any other grounds put forth by the plaintiff, this failure does not lead to a finding of bad faith on the part of plaintiff, or of PW2. If arising out of this omission to include this area in the measurements, the allegation was for negligence on the part of PW2, an agent of the plaintiff, this may well be another matter but that is not the case here, and it was never in issue as such.

37. Fourthly the defendant submitted that I should ignore the evidence of PW2 in connection with the sale of Magarita Hotel and the reference to the size of Bugolobi flats. Ignoring this portion of PW2's testimony does not advance the defendant's case any further nor does it detract from the credit given to the testimony of PW2. Such testimony was intended to illustrate points the witness was making in response to questions put to him by both the plaintiff and defence.
38. Lastly the defendants claimed it was not afforded an opportunity to participate in the sale in so far as there was no proof service of statutory notice. This did not arise on the pleadings or in the issues. It cannot be raised now. Be that as it may, PW1 testified that statutory notices were served by postal service upon the address of the mortgagor that was known to the plaintiff. DW1, the managing director of the mortgagor, testified that he did not inform the plaintiffs of ceasing to use that postal address. The statutory notice was due to the mortgagor, and not the principal debtor, or guarantors.
39. I find that all the grounds put forth by the defendant to allege bad faith on the part of the plaintiff in the sale of the mortgaged property have failed. The plaintiff advertised the mortgaged property for sale after default of payment of the loan/overdraft. There was an auction. Two bids were received. The highest bid was accepted. This was slightly above the force sale value of the mortgaged property provided by Bageine and Company, a surveying firm. The sum of Shs.82,000,000.00, the sale price, is not so outrageously low for a property in Kasese, as to be evidence of bad faith or fraud on the part of the plaintiff. At least no evidence has been adduced to that effect. The counter claim is accordingly dismissed.
40. The defendant no.2 in his testimony, (DW1), accepted that the defendants are indebted to the bank. PW1 testified that Shs.217,851,085.00 was owing as of June 2003. The plaintiff claims the sum of Shs.239,893,137.00 which is on the bank statement attached to the plaintiff as at the 1st November 2004. Accordingly I enter judgment for the plaintiff in the

sum claimed in the plaint, Shs.239,893,137.00, less Shs.2,000,000.00 which the plaintiffs conceded had been paid the defendants, and was not reflected on the defendants' statement with the plaintiff. I award interest at court rate from the date of filing this suit until realisation in full. I grant the plaintiff costs of both the main suit and the counter claim.

Dated, signed and delivered at Kampala this 30th day of March 2005

FMS Egonda-Ntende
Judge