

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-CS-0026-2004

Greenland Bank Ltd (In liquidation)

Plaintiff

Versus

Wasswa Birigwa
Defendants

Achiles Muwonge

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGMENT

1. The plaintiff brought this action to recover from the defendants a sum of Shs.45,963,279.00 being the balance due from a loan advanced to the defendant no.1 and secured with a mortgage to property of which the defendant no.2 was the registered proprietor in 1995. Defendant no.1 defaulted on loan repayments and the plaintiff instructed Express Factors Ltd to sell the mortgage property to recover the outstanding balance at the time.
2. The mortgaged property was sold for Shs.13,000,000.00 to Mr. Kiiza Daniel and Ms Esther Makumbi in September 1998, and this money was credited to the defendant no.1's account with the plaintiff but was not sufficient to clear the outstanding balance at the time, hence this suit.
3. The defendants opposed the suit, and contended that the sale of the property was unlawful as no statutory notice of demand was issued and it was sold negligently at very low prices for which the defendants claimed compensation by way of a counterclaim. The plaintiff's suit was dismissed and the trial proceeds only on the counter claim.
4. The defendant no.2 contends in the counter claim that the sale of the mortgaged

- property was unlawful by reason of the breach of the terms of the mortgage and the plaintiff's duty of care to the defendant in managing the sale, for lack of a statutory notice before the sale and for fraudulently selling the mortgaged property.
5. In its particulars of breach of duty of care it is contended for the defendant no.2 that it was sold without a pre sale evaluation that ought to have guided the sale; it was sold by private treaty rather than by public auction, and that there was no re-advertisement of the sale before the sale.
 6. With regard to fraud the defendant no.2 contends that the plaintiff bank and its agents made false representations and under declarations that the property was sold for Shs13,000,000.00 whereas it had been sold for Shs17,000,000.00. The intention was to defraud the defendants.
 7. The defendant no.2 contends that this illegal and fraudulent sale deprived the defendant no.1, who was the beneficial owner of the mortgaged property of his property and its market value of Shs.85,000,000.00, and mesne profits from renting the property from 1998 to date.
 8. The defendants pray that judgment be entered for them for Shs.85,000,000.00, being the value of the mortgaged property, with interest from date of sale till payment of the same, mesne profits for loss of rental earnings, general damages, interest on decretal amount and costs of this counter claim.
 9. In its answer to the counter claim the plaintiff stated that the property in question was sold properly in accordance with the terms of the mortgage. Secondly that the sale was not fraudulent, and that the auctioneer told the plaintiff it had sold the property for Shs13,000,000.00 which had been credited to the defendant no.1's account. The defendant was duly notified of the sale, and that the sale could be either by agreement or public auction. The plaintiff denied that it acted negligently in the sale of the said property.
 10. PW1 was defendant no.1, Wasswa Birigwa who testified that currently he was Uganda's ambassador to Japan. He stated that he had a loan with Greenland Bank on which he defaulted. He had secured the said loan by way of mortgage over

- land and a house at Busega, at Plot 202, Block 22, Mengo, in the names of defendant no.2. He had bought the said house from Defendant no.2 but had not transferred it into his names. Defendant No.2 granted him a power of attorney to mortgage the said property.
11. He defaulted on payment of the loan. He went and negotiated with an officer of the plaintiff to reschedule the payments thereof. The officer promised to put the agreement they reached in writing to him. No such letter came but he was surprised to be notified that the house had been sold at a low price, without notice to him, and now they were demanding the balance.
 12. When the defendant no.1 investigated the sale of his property, he found out that though the bank claimed it had sold the property for Shs.13,000,000.00, it had actually been sold to the buyers, Daniel Kiiza and Esther Makumbi, for Shs.17,000,000.00. Shs.13,000,000.00 was credited to his account with the plaintiff as proceeds of the sale.
 13. At the time of the sale the defendant no.1 had tenants in the house who were paying Shs.350,000.00 as rent per month. He believes that the value of his house at the time of sale was between Shs.85,000,000.00 to Shs.100,000,000.00. He has suffered embarrassment over this affair. His name was put in the papers that he is being sued, and it upset his family. He had travel from Ethiopia to Uganda for three times to hear this case, and it did not take off. He has now had to travel from Japan.
 14. He prays for compensation for the house, and all costs and expenses he has incurred since as this house was sold fraudulently.
 15. PW2 was Daniel Kiiza. He stated that he bought from Greenland Bank a house formerly belonging to Mr. Wasswa Birigwa. He paid Shs.17,000,000.00 for it. Exhibit P4 was the sale agreement. It indicates that he paid Shs.17,000,000.00. He dealt with a Mr. Maggwa, who he was told was the Estates Manager for Greenland Bank in charge of selling properties for the bank. On the transfer deed, he was surprised when he saw that the purchase price was Shs.13,000,000.00 only. When he requested for an explanation he was told there was no problem.

16. PW3 was Charles Kambiso Okolong, a valuer by profession, working with Oringo and Company. He stated that he was the holder of an advanced Diploma in Land Management and Valuation. He received instructions to value a property in Busega, which he did, and wrote a report, admitted in evidence as Exhibit P11. He concluded that the open market value of the house as at 1st June 1998 was Shs.50,000,000.00 and as of 18th August 2005 it was Shs.85,000,000.00. The rental value of the same was Shs.250,000.00 per month. He indicated that the forced sale value of the house would have been 60% of the open market value.
17. The defendant did not adduce any evidence in this case, apart from the agreed documentary evidence that was admitted by agreement of counsel.
18. The facts of this case are fairly straightforward. The defendant no.1 had a loan with the plaintiff that it had secured by way of a mortgage over Plot. 202, Busega. The defendant no.1 defaulted on payment of the loan. The plaintiff instructed Bremer Associates and Auctioneers to sell the mortgaged property. No notice of default or intended sale was addressed to the defendant no.1 or defendant no.2. Bremer Associates advertised the sale of this property in Njuba Times on 6th May 1998. The notice stated that the sale would take place 30 days from the date of the advert. It is not clear what happened after the expiry of the 30 days.
19. Sometime in September 1998 an agreement for the sale of the said property was made with PW2 and another person, selling the property in question, on behalf of the Greenland Bank to PW2 for Shs.17,000,000.00. The property was subsequently transferred to PW2 and Esther Makumbi with the deed of transfer stating that the purchase price was Shs.13,000,000.00.
20. During the pre trial phase of this case the plaintiff's Mr. Benedict Sekabira swore an affidavit in response to an application for discovery, and attached to it the documents he stated related to the sale of the property in question. The attached documents included an agreement of sale between Paul Maggwa, on behalf of Greenland Bank and a one Mr. Kawesi Collines for the purchase of the said

- property. This agreement is dated 7th September 1998. The purchase price is Shs.13,000,000.00. Mr. Sekabira stated that the plaintiff had no pre-valuation report or post loan valuation report for the mortgaged property in its records.
21. The open market value of the property, three months prior to the sale, was Shs.50,000,000.00.
22. At the scheduling conference the following issues were framed by the parties.
- (i) Whether due statutory notice was served on defendant no.1;
 - (ii) Whether the property was sold fraudulently;
 - (iii) Whether the plaintiff made the correct declaration of the sale price;
 - (iv) Whether the plaintiff acted negligently in the sale of the mortgage property;
 - (v) What if any damages were suffered by the defendant no.1 and
 - (vi) Remedies.

Whether due statutory notice was served on defendant no.1?

23. On the evidence before me it is clear that neither notice of default nor demand of the outstanding sums of money at the time was made upon the principal debtor or mortgager prior to the sale of the mortgaged property. In response to this issue in the answer to the counter claim the plaintiff asserted that the notice was given. No evidence was produced to support that contention. On the contrary, and contrary to this position on its pleadings, Mr. David Mulumba, the learned plaintiff's counsel in his address to this court, stated that notice was not necessary in law, as it was discretionary. He provided no authority for this position.
24. Mr. Nsubuga, learned counsel for the defendants submitted that statutory notice was required under Section 116 and 117 of the Registration of Titles Act before default of the mortgage could be called. The mortgage deed at Part 3(B) also provided for a demand to be made of outstanding sums of money before sale was invoked.
25. I will set out the said provisions.

'116. Mortgage not to operate as transfer. A mortgage under this Act shall, when registered as hereinbefore provided, have effect as a security, but shall not operate as a transfer of the land thereby mortgaged; and in case default

is made in payment of the principal sum or interest secured or any part thereof respectively, or in the performance or observance of any covenant expressed in any mortgage or hereby declared to be implied in a mortgage, and the default is continued for one month or for such other period of time as is for that purpose expressly fixed in the mortgage, the mortgagee or his or her transferees may serve on the mortgagor or his or her transferees notice in writing to pay the money owing on the mortgage or to perform and observe the aforesaid covenants, as the case may be.

117. Where money payable on demand, written demand equivalent to notice. Where money secured by a mortgage under this Act is made payable on demand, a demand in writing pursuant to the mortgage shall be equivalent to the notice in writing to pay the money owing provided for by section 116; and no other notice shall be required to create the default in payment.'

26. Mr. Mulumba contended that the notice referred to herein above is discretionary, and not mandatory. He provided no authority for that provision. This court in *Mubiru v Uganda Credit and Savings Bank Ltd* High Court Civil Suit No. 567 of 1965 (digested in [1978] HCB 109) decided otherwise. The court held that service of the statutory notice required under Section 115 (now 116) of the Registration of Titles Act before sale of mortgaged property must be made in accordance with Section 210A of the same Act. The mortgagee must ensure that the mortgagor is served personally and evidence of this obtained.

27. Clearly in this case there was no such service. Though admittedly, Section 10 of the Mortgage Act, allows sale by a mortgagee, in case the mortgage so provides, and this may be either by public auction or private treaty, this is subject to complying with the issue of a statutory notice. It has not been shown by the plaintiff that it ever issued any notice of default or made a demand for the outstanding sums of money prior to the sale of the property. It follows that this sale which proceeded without the statutory notice was unlawful.

Whether the property was sold fraudulently?

28. It is contended for the plaintiff on the plaint that the mortgaged property was sold to Daniel Kiiza and Esther Makumbi for Shs.13,000,000.00 which was deposited on the defendant no.1's account with the plaintiff. There was indisputable

evidence from PW2, Daniel Kiiza that he paid Shs.17,000,000.00 but for reasons that were not made clear only Shs.13,000,000.00 was reflected in the transfer deed. A receipt for Shs.17,000,000.00 is exhibit P5 and the sale agreement that reflects Shs.17,000,000.00 is exhibit P4. Both these exhibits were admitted by agreement of counsel for all the parties.

29. As I noted earlier Mr. Sekabira had submitted to court in an interlocutory proceeding alleged records of the sale of this property which showed that this property had been sold to Kaweesi Collines of PO Box 9474 Kampala for Shs.13,000,000.00. These inconsistencies in the story for the plaintiff have not been explained.
30. It is clear though that the sale of the property was for Shs17,000,000.00 and this sum was not declared to the defendants. A lower sum of Shs.13,000,000.00 was declared to the defendant, hiding the difference. This reveals a felonious intent to defraud the defendant of the proceeds of the sale. Absent any explanation from the plaintiff this is sufficient to conclude that this property was sold fraudulently.

Whether the plaintiff made the correct declaration of the sale price?

31. Obviously the plaintiff did not declare to the defendants the correct sale price.

Whether the plaintiff acted negligently in the sale of the mortgage property?

32. Given my findings in issues no.1 and 2, that the sale of the mortgaged property was unlawful for lack of a statutory notice, and secondly that the sale was fraudulent, it would be unnecessary to consider this immediate issue. However, just in case I am wrong with respect to the above referred 2 issues, I will proceed to consider the same.
33. In effecting a sale of the mortgaged property the mortgagee or his agents are under a duty to act with reasonable care. The duty is not to sell the mortgaged property at the best price possible but at a reasonable price. In this particular case the sale that occurred was not the result of a public auction. It was by private treaty. The defendant No.1 has produced evidence to show that prior to the sale the open market value of the property was Shs.50,000,000.00. The plaintiff had not taken any care to obtain a reasonable price in as much as it is clear that no pre

sale evaluation of the property was made.

34. I am satisfied that the plaintiff acted negligently, in so far as it failed to obtain a pre sale value of the property, and yet it proceeded to sale the same by private treaty, without the benefit of competition that a public auction provides. I would answer this issue in the affirmative.

Remedies

35. Where a sale is held to be unlawful or negligently carried out, the successful is entitled to recover the difference between the true market value of the property and the sale price realised from the sale. See *Mubiru v Uganda Credit and Savings Bank* (Supra). The true market value at the time of the sale has been stated to be Uganda Shillings 50,000,000.00. The plaintiff is entitled to recover Shs.37,000,000.00 being the difference between the true market value and the sale price of Shs.13,000,000.00. To this sum of Shs.37,000,000.00, I shall add interest of 25% per annum from the date of sale, 8th September 1998, till payment in full.
36. The defendant no.1 claimed mesne profits. I do not think he is entitled to mesne profits or rent, as he has recovered the value of the mortgaged property at the time of sale. He would be entitled to mesne profits for the period he may have shown that he remained owner of the premises, and was therefore entitled to income there from. In this case the defendant no.1 did not seek to revoke the sale, and recover the mortgaged property. Had he recovered the mortgaged property, the claim for mesne profits would have been justifiable.
37. The unsuccessful party is only required to compensate the successful party for the loss suffered only once. If the successful party is allowed to recover the value of the house, he cannot at the same time, recover mesne profits for the post sale period, as he would have the full benefit of the property sold. There would be no basis for a claim for mesne profits. In the result I decline to grant the same.
38. The defendant no.1 claimed general damages for pain and anguish. These damages have not been proven in my view. I decline to make an award under this head. The defendants shall have costs of this action.

Signed, dated, and delivered this 21st day of December 2007

FMS Egonda-Ntende
Judge