

THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-0375-2004

MOSES JIM JJAGWE :::::::::::::::::::: PLAINTIFF

VERSUS

STANDARD CHARTERED BANK (U) LTD :::::::::::::::::::: DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiff, Moses Jjagwe, is a Director in M/S JMK Investments Limited. The defendant is a limited liability company registered in Uganda carrying on the business of banking. The plaintiff operated an account with the defendant bank.

From the evidence and agreed facts, the plaintiff, through his said company, received loan advances from the defendant. He guaranteed their repayment, defaulted and the security was advertised for sale.

The plaintiff was given further opportunity to redeem the property but still failed to do so. The defendant, exercising its power under the mortgage went ahead and sold it. This was after the defendant had accepted a Shs.180m bid offer from one Robert Tibagwa, apparently fronted by the plaintiff, who also failed to beat the deadline set by the defendant. The property was eventually sold to one Ronald Membe for much less than Tibagwa's bid offer. Out of the sale proceeds, the plaintiff received Shs.5, 094,387= by draft. The plaintiff then brought this suit claiming that the defendant negligently exercised its power of sale of the mortgaged property and failed to obtain its true market value. Hence the prayer for special damages and/or alternatively for compensation for

the loss of Shs.60m being the difference of the amount offered by the potential buyer and the sum claimed by the bank.

There are two issues for determination:

1. Whether the plaintiff suffered any loss as a result of the sale.
2. Whether the plaintiff is entitled to the remedies sought.

Representation:

Mr. Edward Mugogo for the plaintiff.

Mr. Patrick Yehangane for the defendant.

As to whether the plaintiff suffered any loss as a result of the sale, the plaintiff admits that all in all the loan advances to his company amounted to Shs.110m. He was supposed to pay it back in a period of two years but defaulted. As I understand Mr. Jjagwe, he is not challenging the sale *per se*. After all, the bank exercised its contractual right under the mortgage. His complaint is that he was imprisoned for matters quite unrelated to the loan and while in prison he learnt about the impending sale of his property in connection with the loan. He contacted his wife and authorized her to ensure that the sale proceeds would be enough to cover the loan and leave him with a balance. He specifically referred her to one Tibagwa who had wanted to pay Shs.180m for it. Mr. Tibagwa did not buy it. It was instead sold to another person at Shs.120m. His evidence is that this was loss to him. Hence the prayer that he be paid Shs.60m being the loss he allegedly incurred in the sale.

The thrust of the plaintiff's case as regards the sale is that in selling the suit property, the bank had a duty to act in good faith. That it had to take reasonable steps to sell it at the true market value or the proper price prevailing at the time of sale. In **National Bank of Commerce Ltd and 2 others, HCCS No. 0496 of 2003**, unreported, this Court had opportunity to state the law as regards the duty of a mortgagee in a sale of this nature. I did state in that case, and I reiterate that position herein, that one of the fundamental equitable principles for the enforcement of mortgages and the protection of borrowers is that the powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment. The burden is on the mortgagee to show that it had taken all reasonable steps to obtain the best price reasonably obtainable on the sale of the property.

I have considered the plaintiff's evidence on this matter, particularly that of PW1 Fred Muwema. He is an Advocate of this Court. He came to know the plaintiff through his wife, Mrs Jjagwe, around April 2004. It was in respect of their house in Ntinda. The wife contacted PW1 after his client, Robert Tibagwa, had called and instructed him to handle purchase of the suit property. The witness proceeded with Mrs Jjagwe to the bank. They met one Wangwe, a Manager, who confirmed to them that the bank was demanding over Shs.100m from Jjagwe and that the security was up for auction. He testified:

“Mr. Wangwe informed me he was aware that the mortgagor, Mr. Jjagwe, was trying to redeem the property by finding a suitable buyer. At that stage I told him I was representing a certain interested buyer Mr. Tibagwa and that he was ready to pay the negotiated price to the mortgagor. The price was Shs.180m. Wangwe advised that since the matter had been handed over to their lawyers, it was better to make a formal communication to them and that the Bank would be responding through lawyers.”

From this evidence, Court is satisfied that the Bank was very much aware as to the frantic effort the mortgagor was making to get the best price for the suit property.

Evidence further shows that around May 19, 2004, the witness (PW1) wrote to the Bailiffs and copied the letter to the Bank lawyers, making an offer of Shs.180m. He proposed a commitment deposit of Shs.10m and payment of the balance within 2 weeks. The Bank through its lawyers accepted the offer as to the period of 2 weeks but declined the Shs.10m commitment deposit.

From the evidence also the lawyers gave the witness up to the end of May 2004 to be through with the purchase transaction. It is evident from the record that Tibagwa also failed to meet the deadline set by the defendant. The circumstances were, however, very telling. They are expressed in PW1 Muwema's own words:

“Because of the difficult situation in which he was in Sierra Leone, it was difficult for him to wire the money to us. He contacted his bankers, DFCU, to provide bridging finance of Shs.100m. For the purpose, he appointed me under a Power of Attorney dated 26/5/2004 to pursue the loan on his behalf. Because of the pressure at the time, DFCU acted

swiftly. By 27/5/2004, they had invited me to sign an offer of Shs.100m on behalf of my client.”

From the records, what ensued were inter bank exchanges between DFCU and Standard Chartered Bank, the defendant. DFCU requested for details of the outstanding amount on the plaintiff's account. The details were furnished by the defendant to DFCU on 30/5/2004. DFCU made it clear to the defendant that it was ready to disburse the Shs.100m in exchange for the security and the relevant documents. There is evidence that PW1 Muwema was in constant touch with the defendant's lawyers at the time, informing them of the progress being made.

It is instructive to note that the defendant's lawyer handling the matter at the time was one Innocent Taremwa. At the hearing, he had to step down as defence counsel because he was an obvious defence witness in view of his heavy involvement in the deal. Hence the involvement of Mr. Yehangane at a later stage. In the end, Mr. Taremwa did not appear as a witness for either party.

From the evidence, the witness (PW1 Muwema) remained in constant touch with the defendant Bank. On 31/5/2004, the last day of the offer period, he wrote to them indicating that DFCU had received a statement from the defendant showing the outstanding amount in the sum of Shs.117m. He assured the lawyers that Shs.100m was ready for disbursement by DFCU and attached a cheque of Shs.17m dated 3/6/2004 to cover the difference between what DFCU had offered (Shs.100m) and the plaintiff's indebtedness (Shs.117m). His unchallenged evidence is that he followed up the letter of 31/5/2004 with constant phone calls to his learned colleagues, counsel for the defendant. Despite these frantic attempts on the part of the plaintiff's lawyers, the defendant's lawyers sold the property to another person at a cost of Shs.120m, apparently at the close of office business on 31/5/2004.

It is argued for the defendant that an offer of Shs.180m from a man of means through a reputable bank with the assistance of a serious lawyer which could not be disbursed within the time clearly laid down by the offeree as at 31/5/2004 makes the purchaser a defaulter. While I can accept the defence argument that time was of essence herein, I cannot accept the argument that the offer of Shs.120m was a reasonable substitute for one of Shs.180m. From the evidence, the property had been taken off the auction block. The Bank had given the mortgagor a chance to obtain the best price for his property. Indeed from the evidence of DW2 Apollo Barungi, the Bailiffs were not

involved in the sale, although he, Barungi, did not want to say so in clear terms. From his evidence, he stopped at advertising the property for sale and later participating in the eviction of the plaintiff's family from the house. Given that a reputable bank, DFCU, had committed itself to source the funds needed by Tibagwa, and given that Tibagwa's lawyer was able to issue a cheque on 31/5/2004, it was, in my fair judgment, unreasonable of the defendant's lawyers to sell the property to another person at such a low price, far below the forced sale value, without subjecting the property to further bids. With the greatest respect to the defendant's lawyers, as agents in the sale of the suit property they acted as automatons. The main point to bear in mind is that the duty to obtain the best price is a duty owed in equity. While the range and scope of the duty is not closed, implying, so to say, that each case must be decided on its unique facts and circumstances, it is not (that is, the range and scope of the duty) yielding much flexibility either. Lenders need to be alert to subsequent challenges and ensure not only that they employ the right selling agents for the job, but also that they take the precaution of obtaining a decent second opinion. It may well be worth trying to accommodate the borrowers views on sale so far as is reasonably practicable.

This is the line of thought and decision in a number of cases, notably **Cuckmere Brick Co. Ltd –Vs- Mutual Finance Ltd [1971] 2 All ER 633** and **Malayan Banking Bhd –Vs- Hwang Rose and others [1997] 3 LRC 224**. I'm in full agreement with it.

Applying the above principles to the facts herein, it is clear to me that the sale was by private treaty, organized by the bank's lawyers. There was no sufficient competitive bidding for the property, even if I were to accept that Tibagwa himself failed to beat the deadline set by the defendant. In these circumstances, it would appear to me that the mortgagee did not exercise reasonable care to realize the asset to the best advantage of itself and the mortgagor. In the end, property which could have fetched Shs.180m if the defendant had exercised due diligence and patience fetched much less. It does not matter that the defendant was not in direct negotiation with the plaintiff's agents. He who does something through another does it himself.

For the reason stated above, Court is satisfied that the hurried sale to Membe caused loss to the plaintiff.

I would answer the first issue in the affirmative and I do so.

As to whether the plaintiff is entitled to the remedies sought, the plaintiff's head prayer is for damages for breach of contract, under valuing and sale of property for a less sum, and loss incurred as a result of the sale. He prays in the alternative for an order that the defendant compensates him Shs.60m, being the loss he incurred through the under valuation and hasty sale of the suit property. General damages are what may be presumed by law to be the necessary result of the defendant's acts. The plaintiff may not prove that he suffered general damages. It is enough if he shows that the defendant owed him a duty of care which he breached. In the instant case, the plaintiff has shown to the satisfaction of Court that the property could have fetched about Shs.180m if the defendant had exercised its powers under the mortgage in good faith and for the purpose of obtaining the repayment. A reputable firm of valuers, Byokusheka & Company, estimated the market value at Shs.210,000,000= and the offer bid of Shs.180m was thrown away on insufficient grounds, much as the sale was conducted under forced circumstances.

From the plaintiff's own evidence, he had also been sued by one Kiyimba Sentongo in **HCCS No. 610 of 2003**. At the time the suit property was sold, the plaintiff was in prison in connection with that case. The amount outstanding was Shs.29, 800,000=. The case for the defendant is that in addition to the Shs.120m paid for the property, a further Shs.29,800,000= was paid to M/S Lukwago, Alaka & Co. Advocates in satisfaction of an order of attachment in **HCCS No. 610 of 2003**. I accept the plaintiff's evidence that up to the time of filing the suit and/or even hearing thereof, the defendant had not fully or at all accounted to him the amount realized from the sale. The defendant as a banking institution earns no credit for this delay. From the evidence, however, Sentongo has since stopped demanding payment from the plaintiff, implying, either, that Ronald Membe paid more than the Shs.120m herein declared to the plaintiff by the defendant, or, that when the defendant got to realize it had messed up the sale, it settled the plaintiff's debt with Sentongo as a compromise. Either way, the defendant has not come out clean on this point. Nevertheless, Court accepts the defence evidence that the outstanding amount on the mortgage transaction as at the time of sale was Shs.117, 824,373=. Shs.29, 800,000= was paid by the defendant to the plaintiff's creditor, one Sentongo, and Shs.5, 094,387= was paid to him as the balance on the sale proceeds. This gives a total of Shs.152, 718,760=, a sum that certainly does not tally with the defendant's declared sum of Shs.149, 800,000=. The difference between the highest bid of Shs.180, 000,000= and Shs.152, 718,760= is Shs.27, 281,240=. From the evidence, therefore, the plaintiff's alternative prayer for a refund to him of Shs.60m is untenable. I would for this reason disallow it.

As regards the prayer for general damages, neither counsel proposed to me what they would deem a reasonable award of general damages. Be that as it may, taking into account:

- (i) that general damages are those which may be presumed by law to be a necessary result of the harm alleged and proved;
- (ii) that the plaintiff's failure to meet his obligations under the mortgage gave no credit to him;
- (iii) that it was well within the defendant's rights to sell the suit property after the plaintiff's default; and
- (iv) that the plaintiff's prayer in the alternative has been disallowed, an award in the sum of Shs.15, 000,000= (fifteen million only) would in my view, put him in the same position as he would have been in if the defendant had taken all reasonable steps to obtain the best price for the property. It is awarded to him.

The same shall attract interest at the rate of 25% per annum from the date of judgment till payment in full. The plaintiff shall have half the taxed costs of the suit.

There will be no order for nullifying, restraining and/or stopping the sale of the suit property.

I so order.

Yorokamu Bamwine

J U D G E

01/06/2007

Order: The Registrar shall deliver this judgment on my behalf on the due date.

Yorokamu Bamwine

J U D G E

01/06/2007