

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 451 OF 2009**

GRACE TIBANAGWA}..... PLAINTIFF

VERSUS

- 1. SOLOMON R. TIBANAGWA }**
- 2. DELUX JOINERY AND BUILDING }**
- CONTRACTORS LIMITED }**
- 3. DIAMOND TRUST BANK UGANDA LTD}..... DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

When this suit was mentioned today the 15th of December 2011 counsel Earnest Sembatya appeared for the 3rd defendant Messrs Diamond Trust Bank but the plaintiff's counsel was absent. It should be noted that the first defendant is the plaintiff's husband. Counsel for the 3rd Defendant submitted that Frank Owesigire was served on the plaintiff's behalf on the 6th of December 2011 and return of service filed on the 13th of December 2011. Service was acknowledged as indicated in the return of service. He further submitted that the court issued a direction on the 18th of August 2011 directing both parties to exchange documents and meet.

He informed court that they sent the 3rd Defendant's documents to the plaintiff's advocates on the 29th of September 2011 under cover of a letter copy of which was filed on the court record. Counsel contended that their client's bundle of documents was filed in court but to this date the plaintiff has not filed the bundle of documents as directed by the court. The 3rd Defendants lawyers also wrote a letter to the plaintiff's counsel calling for a meeting in compliance with the directive of court and this has not been heeded by the plaintiff's advocates. He prayed for dismissal of the suit under order under order 9 rule 22 of the Civil Procedure Rules.

I have carefully considered the submissions of counsel and his prayer that this suit should be dismissed under order 9 rules 22 of the Civil Procedure Rules. I do not agree that this rule should be applied in the circumstances of this case. The applicable rules are the Constitution

(Commercial Court) (Practice) Directions Statutory Instrument- Constitutional 6. Rule 7 thereof which provide as follows:

"Failure by a party to comply in a timely manner with any order made by the commercial judge in a commercial action shall entitle the judge, at his or her own instance, to refuse to extend any period of compliance with an order of the court or to dismiss the action or counterclaim, in whole or in part, or to award costs as the judge thinks fit."

In the circumstances I will consider whether I should proceed to dispose of this action under order 17 rules 4 of the Civil Procedure Rules or dismiss it as prayed for. The principle contention of the plaintiff in the plaint is for a declaration that any transaction on the suit property whether sale, mortgage or whatsoever made between the defendants as averred in the plaint is null and void. The plaintiff also seeks a permanent injunction. The plaintiff avers in the plaint that the said transactions in the suit property were entered into or done without the knowledge and consent of the plaintiff and that the plaintiff was not a party to the said loan transactions. The documents unveiled by the third defendant in its Written Statement of Defence show that the plaintiff is not only a signatory to the mortgage in question but also guarantor for the repayment of the loans the subject matter of the suit. The third defendant counterclaimed under the guarantee instruments against the plaintiff and judgement in default was entered by the Registrar against the plaintiff on the 21st of July 2011 under Order 9 rules 6 of the Civil Procedure Rules. This judgment inter alia was based on the guarantee.

No effort has been made to set aside the judgment based on the guarantee of the loan repayment by the plaintiff. The plaintiff has not taken any action to enhance the progress of the suit and all proceedings for hearing are being pursued by the 3rd Defendant. On the 3rd of April 2011 the matter was sent back for mediation. It was thereafter fixed for hearing on the 22nd of August 2011 and a joint scheduling memorandum directed by court to be filed by the parties within three weeks. As submitted by the 3rd defendants counsel, the plaintiff has not complied with the directions of this court for the further progress of this matter. In the circumstances of this case and in light of the decision of this court in **Agnes Bainomugisha versus DFCU Ltd High Court Commercial Division Civil Suit No. 518 of 2007** delivered on 20 May 2011, this suit is decided under order 17 rule 4 of the Civil Procedure Rules and the plaintiffs action is dismissed with costs.

Judgment delivered this 15th day of December 2011

Hon. Mr. Justice Christopher Madrama

Judgment read in the presence of:

Earnest Sembatya for the 3rd defendant Diamond Trust bank

Ojambo Makoha: Court clerk,

Hon. Mr. Justice Christopher Madrama