THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

CIVIL SUIT NO. 421 OF 2002

1. **JEMEO TWASE]**
2. **JANAT TWASE]**
3. **YUDAYA TWASE]::PLAINTIFFS**
4. **KIYINGI ADAM]**

[As Administrators of the Estate of

the late Twase Sulaiman]

VERSUS

1. **ATTORNEY GENERAL]**
2. **BENSON NINSIIMA]::::::::::::::::::::::::::::::::::::DEFENDANTS**

BEFORE: HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

The plaintiffs by this suit sought for a declaration that the sale of the premises comprised in Mailo Register Volume 1956 Folio 13 Block 213 Plot 251, Bukoto by the Non Performing Assets Recovery Trust (NPART) to the 2nd defendant is null and void, general damages for breach of contract and compensation for the sale of the said premises. In their amended written statement of defence, the defendants denied the claim

The facts of this case so far as can be ascertained from the pleadings and the documents is that sometime in 1995, Mr. Twase Suleiman (now deceased) entered into a contract with his employer, Uganda Development Bank (UDB) for a housing loan of Ushs. 31,000,000/=. The loan was to be recovered from his housing allowance over a period of 15 years at a monthly instalment. Following a restructuring programme at UDB, Mr. Twase lost his job in 1998 and consequent audits revealed that the outstanding balance on his facility stood at Ushs. 31,024,440/=. His terminal benefits of Ushs. 5,377,272/= was subsequently used to offset part of the loan leaving an outstanding sum Ushs. 27,865,216/= which continued to attract interest. The parties then executed a legal mortgage in which Mr. Twase was allowed to submit a loan repayment proposal within 18 months from 12th February 1998 when the Mortgage Deed was

signed. Mr. Twase made a proposal which he later breached and a declaration of breach was made by UDB.

Subsequently, that debt which had accumulated to Ushs. 29, 399, 217/= was transferred to NPART for recovery. In August 2001, NPART notified Mr. Twase about the transfer and demanded payment within 15 days but the late Twase did not comply. Within the same month an internal valuer of NPART valued the suit property and gave an open market value of Ushs. 43,000,000. A further demand was made in December 2001 to no avail and the property was advertised for sale in January 2002 and it was sold to the 2nd defendant by public auction on 26th February 2002 at Ushs. 34, 400,000/=. On 25th February 2002, the late Twase paid Shs. 1,000,000/= to NPART and on 26th February 2002 he again paid Shs. 980,000/=.

Later in May 2002 he wrote a letter to NPART undertaking to withdraw the suit he had filed and the caveat and pay a lamp sum of Ushs. 35,000,000/= to redeem the suit property. It appears he did not keep that undertaking. He was however, aggrieved by the said sale hence this suit.

The suit was scheduled and part heard by another judge. Unfortunately, the original plaintiff passed away after giving his evidence and when I took over the file in 2011 the administrators of the estate of the late Suleiman Twase were substituted as plaintiffs. Similarly, the life span of NPART the original 1st defendant also expired and the Attorney General was substituted as the 1st defendant. Upon closure of hearing evidence the parties filed written submissions based on the five agreed issues which I have considered in this judgment.

During scheduling, the following issues were agreed upon;

1. Whether there was breach of the staff loan contract by UDB.
2. Whether the mortgagor breached the mortgage agreement.
3. Whether NPART sold the property wrongly.
4. Whether the property was sold at an undervalued sum.
5. Whether there are any remedies.

I will resolve issue 1 separately, issues 2 and 3 together and issues 4 and 5 separately.

issue 1: Whether there was breach of the staff loan contract by UDB.

It was submitted for the plaintiff on this issue that the termination of the late Twase's employment with UDB was a clear breach of the terms of the loan agreement since it brought the repayment period of the said loan to an abrupt halt and as such this issue should be answered in the affirmative.

It was submitted for the 1st defendant that there was no breach of the staff loan contract as alleged or at all on the part of the 1st defendant. It was also submitted that it is not clear how the 1st defendant failed to fulfil or to comply with or breached the relevant terms of the staff loan agreement and in what particulars and thus, the defendant's breach, if any, is very unclear to the

point of being non-existent. Counsel wondered what was illegal about transferring the loan to the NPART and concluded that there is no evidence on record to support the allegation of breach.

Quoting paragraph 2 of the recitals of Exhibit P4 (the legal mortgage), Counsel stated that UDB and the plaintiff agreed inter alia thus:

> ***"… The Bank's Staff Housing Scheme is hereby made part and parcel of this mortgage deed and in case of conflict between the terms of this mortgage deed and the Bank's Staff Housing Scheme, this mortgage deed shall prevail."***

It was submitted for the 1st defendant that the original housing loan contract the plaintiff claims the 1st defendant breached was varied under paragraph 2 of Exhibit P4 and that in a nutshell, it was subsumed into the mortgage agreement. It was therefore contended for the 1st defendant that there was no breach but rather a variation of terms of the mortgage.

The 2nd defendant associated himself with the submissions of the 1st defendant on this issue.

Upon reviewing the pleadings, documents and all the evidence as relate to this issue, I have come to the conclusion that; first the staff loan facility agreement and the employment of the plaintiff with UDB were two separate contracts. The staff loan facility, in my considered view, was never a term of the employment contract. Second, it was never guaranteed under the staff loan agreement that the late Twase would remain in employment for as long as the loan subsisted. The loan facility was merely a privilege that the employer extended to its staff who willingly took it at his own risk and gave his certificate of title of the suit property as security. The fact that the loan was to be serviced using the salary did not make his employment contract security for that loan. Neither did it in any way imply that the services of the staff would not be terminated under any circumstances. To suggest so, in my view, would have the undesirable effect of setting a wrong precedent that would be harmful to the financial institutions and the entire economy of this country. I believe it would also be counter-productive for bank employees as no bank would be willing to extend such privileges to its staff.

I am therefore unable to agree with counsel for the plaintiffs that UDB by laying off the late Twase rendered him unable to pay the loan and by so doing should be held in breach of the same. Upon termination, he was given ample opportunity to present his proposal for repayment of the loan which according to Exhibit D2 he did present but subsequently breached it. He was again given other opportunities by NPART as per Exhibit D3 which according to his testimony he failed to act on because he could not commit himself to a payment schedule when he did not have a regular source of income. I would therefore answer this issue in the negative by holding that UDB did not breach the staff loan contract.

Issues 2 & 3: Whether the mortgagor breached the mortgage agreement and whether NPART sold the property wrongly.

It was submitted for the plaintiffs on issue 2 that the mortgagor never breached the mortgage agreement but on the other hand there were deliberate anomalies committed by the first defendant departments for example, the abrupt termination of the plaintiff's services. It was also contended that the plaintiff was never given notice before sale of the suit premises contrary to section 202 of the Registration of Titles Act (RTA). Counsel submitted that service in mortgage transactions, should as far as possible, be personal and failure to serve a notice of demand personally on the mortgagor before the sale will render the same wrongful. Counsel cited the authority ***of Eriyazali Senkuba V. Uganda Credit Savings Bank [1965] EA 624*** for this principle.

Counsel also submitted on this issue that Mr. Suleiman in his testimony testified that he was never served.

On issue 3, it was submitted for the plaintiffs that the late Twase responded positively when he realised that his file was transferred to NPART and negotiated and agreed with NPART to pay the loan in installments and even effected part payment as per Exhibits P5 (i) & P5 (ii). Counsel submitted that contrary to this, NPART did everything hurriedly and gave the debtor very little time to pay the loan. It was argued that the letter notifying sale was issued on 12/2/2001, the mortgagor learnt of the sale on 25/2/2002 and the sale was done on 26/2/2002 despite several pleas to NPART to wait. Counsel therefore invited court to answer issues 2 and 3 in favour of the plaintiffs.

It was submitted for the 1st defendant that no particulars of breach was pleaded or proved by the plaintiffs. It was also submitted that the mortgagor agreed under the mortgage (Exhibit P4) to pay the loan with interest in the manner specified in the loan repayment proposal to be submitted by the mortgagor and accepted by the bank within 18 months and that the mortgagor submitted the same as disclosed in Exhibit D2. It is however, noteworthy that the actual payment proposal referred to in that letter was not availed to this court.

Counsel further submitted that Exhibit D2 was a correspondence declaring an event of default by the mortgagor of the payment proposal he had fixed by himself. Counsel therefore submitted on this issue that it was the plaintiff/mortgagor in breach of the mortgage by failing to repay the loan and court should hold so.

It was submitted on issue 3 for the 1st defendant that UDB was justified in transferring the loan to NPART for recovery because the facility was non performing and the sale was proper as per clause 5 (b) (i) of the Mortgage Deed where the mortgagor consented to sale upon default by public auction or private treaty.

The 2nd defendant associated himself with the submissions of the 1st defendant on issues 2 and 3.

I have reviewed the pleadings and evidence relevant to the issues above and also considered the submissions of counsel. Exhibit D2 is a notice given to the late Twase by UDB wherein it was declared that he defaulted on the loan and should pay forthwith within 30 days. It is dated 4th May 2001. The late Twase in his evidence confirmed that he received that letter. On 16th August

2001 NPART wrote Exhibit D3 by which it informed the late Twase that his outstanding obligation to UDB which was due and owing and stood at 29,399,712/= had been assigned to NPART for recovery. The said amount was demanded forthwith and in any case before the lapse of 15 days from the date of that letter. He was put on notice that if he failed to comply NPART would without further recourse to him put in motion all the machinery at its disposal for the recovery of the same.

The late Twase testified that upon receiving that letter he went to NPART and Mr. Nguga handed him to someone whom he told his plight, that is, his failure to raise the money and he was told to go back and see what he could do. On 12th December 2001, NPART again wrote another letter (Exhibit D4) to the late Twase informing him that the legal life of NPART had been extended and all debtors were invited for the amicable rescheduling of their loan repayments from the date of that letter but in any case not later than 11th February 2002. It appears the late Twase did not respond immediately but attended a meeting much later on 29th May 2002 the day he wrote Exhibit D6 wherein he referred to a meeting of that morning. In that letter which was addressed to the Trust Administrator, he indicated that he had accepted the professional advice given to him by the Trust Administrator and undertook to remove the caveat placed on the title deed and withdraw the case from court and hoped that after doing so NPART would accept his payment of Ushs. 35,000,000/= in a single instalment.

Exhibit D5 shows that the suit property was advertised for sale by public auction/private treaty in the Daily Monitor of 25th January 2002 and the mortgagor's property appearing as No. 40 was to be sold on 26th February 2002. According to the sale agreement dated 26/02/2002, the suit property was actually sold to the 2nd defendant on the said date at Ushs. 34,400,000/=.

Under clause 5(b) (ii) of the Mortgage Deed, the mortgagor consented to sale of the security without recourse to court by public auction or private treaty upon default. The sale was by public auction.

I will consider the relevant provisions of the RTA and the Mortgage Act Cap. 229 in determining these two issues although the Mortgage Act has since been amended. This is because it was the applicable law at the time of the transaction in dispute.

Section 116 of the RTA provides as follows;

> ***"A mortgage under this Act shall, when registered as hereinbefore provided, have effect as security,.....and in case default is made in payment of the principal sum or interest secured or any part thereof respectively,.....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."***

Section 117 of the RTA also provides that;

> *"Where money is 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****."* (Emphasis added).

Section 2 (1) (a) and (b) of the Mortgage Act Cap. 229 provided that upon the failure of performance of any covenant in a mortgage, the mortgagee may sue the mortgagor or realise his or her security under the mortgage in any manner provided in the Act.

Section 3 of the same Act further provided that a mortgagee may realise his or her security under the mortgage by appointing a receiver; by taking possession of the mortgaged land; and by foreclosure. It should be noted that these remedies are alternative and the mortgagee can chose to enforce any or a combination of them.

Section10 of the Mortgage Act Cap. 229 provided that;

> ***"Where the mortgage gives power expressly to the mortgagee to sell without applying to court, the sale shall be by public auction unless the mortgagor and the encumbrances subsequent to the mortgagee, if any, consent to sale by private treaty."***

In the instant case, evidence on record shows that upon default of the mortgagor notice was given by UDB by letter dated 4/5/2001 and subsequently by NPART as per Exhibits D3 and D4 in compliance with the law and clause 5 of the Mortgage Deed. The sale of the suit property was eventually done on 26/02/2002 when the mortgagor failed to pay the loan despite being given ample opportunity to do so. Even though the late Twase testified that he did not receive Exhibit D4, it is the view of this court that notice in terms of sections 116 and 117 of the RTA had already been given to him as per Exhibit D3 which he failed to comply with. Exhibit D4 was written out courtesy as the legal requirement had already been complied with.

The Supreme Court of Uganda, while considering the then section 9 of the Mortgage Act (equivalent to section 10 of Cap 229) in ***Barclays Bank of Uganda v Livingstone Katende Civil Appeal No. 22/93*** held firstly, that the bank does not require leave of court to realise its security once by the terms of the mortgage the mortgagor irrevocably expressly consented to the sale without recourse to court in event of failure to repay the loan. Secondly, that the clause in a mortgage decree which allows a mortgagee to sell without recourse to court does not oust the jurisdiction of court. Thirdly, that there can be no principle of natural justice which outshines an express legislative provision such as section 9 of the Mortgage Decree and finally that the sale was sanctioned by section 9.

In view of the above provisions of the law and the case law authority, this court is convinced that the mortgagor breached the terms of the Mortgage Deed by failing to pay the loan upon demand. The argument by counsel for the plaintiffs that the late Twase was not given notice is unbelievable as it contradicts the evidence on record. This answers issue 2 in the affirmative.

I am equally convinced that the sale of the suit property was done in accordance with the provisions of the law and the Mortgage Deed as notice was given to the mortgagor and so NPART cannot be faulted. The late Twase in his own testimony stated that upon receiving the notice and going to NPART he did not make any proposals to repay the loan as he could not commit himself since he did not have any regular income. The so called frantic effort to save the property alluded to by counsel for the plaintiffs, by paying Ushs. 1,000,000/= a day before the sale and Ushs. 980,000/= on the day of sale, in my view came too late and was too small to suggest any seriousness on his part. If the late Twase had brought the entire outstanding amount or even 50% of it prior to the sale I would have faulted the sale. He did not pay even a paltry 10%. The submission of counsel that Housing Finance Ltd had offered to pay the loan but NPART refused to comply is not at all born by the pleadings and evidence. It was merely evidence from the bar which is barred by law. In the circumstances, the plaintiffs have failed to prove on a balance of probability that the sale was unlawful. I instead find and hold that the sale was lawful thus answering issue 3 in the negative.

Issue 4: Whether the suit property was sold at an undervalued sum.

It was submitted for the plaintiffs that the suit property was grossly undervalued and that the valuation is subject to suspicion in that the said valuer was an employee of NPART and had to do everything to please his employer. Furthermore, that the debtor never had any chance in the nomination of the valuer. The plaintiffs contend that the valuer was therefore not neutral. According to counsel, it was inconceivable that the suit premises, situated in Bukoto could be valued at Ushs. 43,000,000/= only.

The 1st defendant submitted that the valuation was right and proper and that since the plaintiffs had the burden of proof, they should have sponsored another valuation and tendered the same in court but they did not. Counsel also submitted that in his letter Exhibit D6, the mortgagor wrote to NPART and proposed to redeem the property at Ushs. 35,000,000/=, meaning that he was also estimating the suit property at close to the valuation amount and since the professional valuer's amount is 43,000,000/=, the plaintiff is estopped from challenging the same.

I have reviewed the evidence and submissions on this issue as well as considered the peculiar circumstances of this case. I note that the valuation report (Exhibit D7) which was made in August 2001 does not indicate the forced sale value of the suit property. In fact the valuer (D1W) testified that he did not include the forced sale value but he arrived at the open market value of

Shs. 43,000,000/= using the cost approach which entailed estimating the replacement costs, new and allowing for depreciation accrued and adding the estimated value of the land.

I also wish to note that at the scheduling conference all the documents attached to the pleadings were agreed upon except annexture "D" to the amended plaint dated 26th September 2003. Annexture "G" which was among the agreed documents is a valuation report of the suit property commissioned by the late Twase. In paragraph 5(j) of that amended plaint it was stated that the actual value of the suit property as per that report was Ushs. 55,000,000/=. I have perused that report which was only marked for identification although it was an agreed document and I note that the forced sale value was put at 40,000,000/=. That valuation report was signed by M/S Byokusheka and Company Chartered Surveyors, Valuers and Estate Agents in February 2002. The valuer did not appear in court to testify because he was reported to have passed away sometime back and no one else in his firm was willing to testify.

I have compared that report and the one being challenged by the plaintiffs and I do not see such wide disparity as to cause concern that it was tailored to suit the interest of the mortgagee. It should be noted that the disputed report was made earlier than the one commissioned by the late Twase. Besides, valuation is not an exact science that one would expect two different valuers to come up with the exact figure even if they did the valuation at the same time. While I appreciate that the mortgagee has a duty to take reasonable precautions in the conduct of the sale so as to obtain the true market value from the property as was stated in ***Epaineti Mubiru v Uganda Credit and Savings Bank HCCS No. 567 of 1965***, I do not find that in the instant case that duty was breached.

In ***Roger Micheal and others v Douglas Henry Miller and Another [2004] EWCA Civ. 282, Lord Justice Jonathan Parker*** stated that:-

> ***"In my judgment, just as, applying the Bolam Principle, a valuer will not breach his duty of care if his valuation falls within an acceptable margin of error...., so a mortgagee will not breach his duty to the mortgagor if in the exercise of his power to sell the mortgaged property he exercises his judgment reasonable; and to the extent that that judgment involves assessing the market value of the mortgaged property the mortgagee will have acted reasonably if his assessment falls within an acceptable margin of error."***

I am fully persuaded by the above decision and my considered view is that in the instant case the value arrived at in Exhibit D7 was within the acceptable margin of error. That value in my view represented a fair open market price of the suit property as at August 2001. I am therefore of the firm view that NPART reasonably exercised the power of sale under the Mortgage Deed when it sold the suit property by public auction at Ushs. 34,400,000/= after the same was advertised. In any event, it has been held and I am persuaded by that decision that *if a mortgagee exercises his*

power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor. See: ***Downsview Nominee Ltd and another v First City Corp Ltd and another [1993] 3 ALL ER 626 at p.637*** as per ***Lord Templeman***.

In the premises, I hold that the circumstances of this case do not indicate any bad faith on the part of NPART that would lead this court to conclude that the suit property was sold at an undervalued sum. I have instead observed a lot of good faith on the part of UDB and NPART which exhibited a lot of patience by delaying sale of the suit property from 4th May 2001 when an event of default was declared to February 2002 when it was actually sold. For the above reason, I find and hold that the suit property was not sold at undervalued sum. This answers issue 4 in the negative.

Issue 5: Remedies

In view of my findings on all the above issues, the plaintiffs are not entitled to any remedies. In the result, I would dismiss this suit with costs and I so order.

Dated this 28th day of May 2013.

Hellen Obura

JUDGE

Delivered in chambers at 4.00 pm in the presence of Ms. Nalubega Shamim who was holding brief for Mr. Suleiman Musoke for the plaintiffs and Mr. Gerald Batanda for the 1st defendant. The 2nd defendant and the 3rd and 4th plaintiffs were also present.

JUDGE

28/05/13