

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

HCT-00-CC-OS-0005-2012

GLOBAL TRUST BANKPLAINTIFF

VERSUS

FRANK MUGISHADEFENDANT

BEFORE: HON MR. JUSTICE M. W. MUSENE

JUDGMENT

The plaintiff/Mortgage Global Trust Bank Limited, Filed this Application by Originating Summons under section 20 and 24 of the Mortgage Act, 2009 and O. 37 rule 4 of the Civil Procedure rules. The application was against Frank Mugisha, the Defendant/ Mortgagor. It was an application for foreclosure and sale of the mortgage property.

The facts giving rise to the application were that sometime around 9.2.2011 the defendant obtained a loan of Shs80,000,000 from the plaintiff. The defendant mortgaged as security land situated in Block 395 Plot 1692 at Sekiunga Busiro, Musaale. As on the 4th October, 2012 the Defendant Defaulted to pay Shs126,173,356 to the plaintiff. And the plaintiff has applied to court for an order of foreclosure. The issues for consideration by this court are:-

1. Whether the plaintiff may exercise its right of foreclosure.
2. What are the remedies available.

The plaintiff/mortgage was represented by Mr. A. S. Mugenyi, while the Defendant was unrepresented. Both parties were directed by this court to file written submissions. Counsel for plaintiff submitted that the application was for determination of the defendant's liability to the plaintiff and appropriate remedies. He referred to the affidavit of Grace Karuhanga, the Legal Manager of the Plaintiff.

He added that the defendant obtained a loan of Shs80,000,000 as a credit facility. And that under clause 5 (i) of the agreement the Defendant undertook to effect monthly payments of Ugx4,269,772/= Counsel for the plaintiff added that the said loan was secured by the defendants land comprised in Block 395, Plot 1692 situate at Sekiwunga, Busiro and that a Mortgage was registered on the Certificate of Title. Counsel for the Plaintiff further submitted that the defendant having failed to service the loan, owed the plaintiff the sum of Shs126,173,356 as for the 4th October 2012. And that since the Defendant was served with Default Notice, he does not dispute the fact that he failed to pay the loan he obtained from the plaintiff. Counsel for the Plaintiff concluded that it is now two years since the Defendant was given notice but he has not obliged.

In his written submissions, the Respondent admitted having gotten a loan of Ugasshs80,000,000/= from the plaintiff in February 2011. The respondent/Defendant also agreed that he mortgaged his home on Plot 1692 Block 395 Busiro as security to the plaintiff. He added that he paid the plaintiff a sum of Ugshs45,000,000/= at the beginning of April, 2013, through the plaintiffs lawyers, Asa Mugenyi. The defendant/Respondent attached an alleged Bank Statement to his Written Submissions. The respondent/Defendant concluded that his home should not be sold to realize the balance, but that this court should allow the restructuring of the loan payment terms.

In rejoinder, the plaintiff denied receipt of Shs45,000,000/= that the Respondent/Defendant purported to have paid to the plaintiffs lawyers. The defendant was challenged as to why he did not state so on oath or file an affidavit in reply. The authenticity of the Bank Statement in respect of the Shs45,000,000/= was also doubted as it did not state the outstanding loan balance.

This court has carefully considered all the submissions on both sides and the pleadings on record.

Under O. 37 r 4 of the Civil Procedure rules,

“Any mortgage or mortgagor, whether legal or equitable, or any person entitled to have property subject to a legal or equitable charge, or any person having the right to foreclosure or redeem any mortgage whether legal or equitable may take out as of course an originating summons, returnable to a Judge in chambers, for such a relief or the nature or kind following as may be by the summons special and as the circumstances of the case may require, that is to say, sale, foreclosure delivery of possession by the mortgagee.”

As far as the circumstances of this case are concerned, the Defendant is in possession of the security he pledged to the plaintiff.

Under S. 8 (I) of the mortgage Act, Cap 229 Laws of Uganda, A mortgagee may apply to court to foreclosure the right of the mortgagor to redeem the mortgaged land any time after breach of covenant to pay. It further provides that is the mortgagor fails to pay, the court shall order that the mortgagor be foreclosed of his or her right to redeem the mortgaged land and that the land be offered by the mortgagee for sale.

And as was held in How Vs Vignes (1628) 1 Ch Rep. 32 Foreclosure makes the mortgagee the absolute owner of the property given as security. The right to foreclose does not arise if repayment has become due at law when the legal date for redemption has passed or if the mortgagee has made the money fall due on breach of any term of the mortgage. Once that happens, then the mortgagee is entitled to commence foreclosure proceedings.

In the present case, the Defendant accepts that he actually took the loan from the plaintiff/Applicant and he deposited the land Title for Plot 1692 Block 395 Busiro as security.

And this court further find that the Defendant has not complied with the terms of the credit facility agreement as he has not paid the agreed monthly installments of Ugshs4,269,772 for the last two years despite repeated demands. The defendant’s claim to have paid Shs45,000,000/= to the plaintiffs lawyers has not been proved, particularly in the absence of any receipt or acknowledgement or reflection in the Banks ledger to show the Outstanding Loan Balance.

In the premises, this court finds and holds that this is a fit and proper situation where the Applicant should exercise the right of foreclosure as the Defendant is in total breach of the credit facility Agreement.

The application is accordingly hereby allowed and the following order are made:-

1. The plaintiff exercises its rights of foreclosure.
2. The property mortgaged is to be sold to realize the amount due.
3. The defendant delivers vacant possession of the security or mortgaged property.
4. Costs of the application to the plaintiff/Applicant.

Judge

27. 6. 2013

Mr. Mugenyi for plaintiff present

Defendant absent

Ojambo Court Clerk present

Court: Ruling read out in open court

Justice W. M. Musene

HIGH COURT JUDGE

27.6.2013