THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

CIVIL SUIT NO. 813 OF 2007

JEANE FRANCES NAKAMYA::::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

1. DFCU BANK LTD}

2. ALEW JANYARE DONATUS}::::::::::::::::::::::::::::::DEFENDANTS

BEFORE: HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

The plaintiff mortgaged her property comprised in Kyadondo Block 265 plots 1861,1862 and 5036 situate at Bunamwaya to the 1st defendant as security for payment of a loan of Ushs.15,000,000/=(first it was 12,000,000/= then the plaintiff later got an overdraft facility of Ushs. 3,000,000/=). The plaintiff defaulted on her repayment obligations despite the 1st defendant's demands. Consequently, the 1st defendant, in exercise of its power of sale as mortgagee, appointed the 2nd defendant to realise the said security to recover monies due and owing from the plaintiff. The 2nd defendant advertised the suit property for sale which was scheduled to take place on 8th February 2004 but it did not take off.

The property was subsequently sold to a one Iga Francis at Ushs. 40,000,000/= after which the proceeds were applied towards clearing the outstanding sums due from the plaintiff and recovery costs and the balance in the sum of Ushs. 8,446,371/= was remitted to the plaintiff. The plaintiff is not in agreement with the manner the sale was conducted and the amount the property was finally disposed of hence this suit where she claims against the defendant for special, aggravated and general damages, interests and costs of the suit.

At the scheduling conference, the following issues were agreed upon;

1. Whether the sale of the suit property by the defendants to Iga Francis was lawful.
2. Whether the suit property was undersold.
3. What remedies are available to the parties?

Upon completion of hearing evidence counsel for the parties filed written submissions. Mr. David Kaggwa of M/S. Kaggwa & Kaggwa Advocates appeared for the plaintiff and Mrs. Olivia Kyalimpa Matovu of M/S. Ligomarc Advocates appeared for the defendants. I must commend both counsel for their eloquent arguments supported by relevant authorities.

Issue 1: Whether the sale of the suit property by the defendants to Iga Francis was lawful.

Counsel for the plaintiff submitted on this issue that the sale to Iga Francis was unlawful because the plaintiff was not properly served with the statutory notice before sale. It was also contended that the defendants breached their duty of care to the plaintiff in the exercise of the power of sale of the suit property.

Counsel submitted that the sale of the suit property was commenced by a letter dated 30th January 2004 marked as Exhibit P5 (D8 on the defendant's exhibits). The said letter is addressed to the plaintiff and the address is stated as Bunamwaya. Counsel submitted that in cross examination, the 2nd defendant stated that he served the said letter upon the plaintiff in his office and made no mention of whether he tried to serve the letter at Bunamwaya. Counsel contended that this letter does not bear any evidence of receipt by way of the plaintiff's signature acknowledging the same. According to counsel, the burden of proving that the letter was properly served was squarely on the defendants but was not discharged. Counsel submitted that the plaintiff only knew about the sale when the property was advertised. He argued that failure to serve the plaintiff with the statutory notice as required by law rendered the sale wrongful and court should find so. Counsel referred to the authority of ***Epaineti Mubiru v Uganda Credit and Savings Bank HCCS No. 567 of 1965*** for this proposition.

Counsel also submitted that the defendants breached the duty of care owed to the plaintiff when they failed to effectively advertise the suit property as to give it adequate publicity in order to attract as many potential bidders as possible on the

auction date. Counsel relied on the authority of ***Cuckmere Brick Company Limited v Mutual Finance Limited [1971] 2 AllER 633 and [1971] EWCA Civ. 9***.

Counsel for the defendants submitted on this issue that the sale of the suit property to Iga Francis was lawful and court should find so. She argued that the sale was conducted by the defendants in exercise of the 1st defendant's right as a mortgagee to realise its security and recover monies which were long overdue from the plaintiff. Counsel submitted that the plaintiff was duly served with the notice and that absence of her signature does not mean that she did not receive the notice.

Counsel further submitted that even without the notice served on the plaintiff by the second defendant, the 1st defendant had already complied with the requirement of the service of statutory notice as provided for under section 116 and 117 of the Registration of Titles Act, Cap 230. According to counsel, evidence on record shows that the plaintiff was issued with several demands for payment and was advised that if she failed to comply, recovery would be pursued and the security would be realised as per Exhibits D4, D5 and D6.

Counsel also submitted that the defendants took reasonable steps in the exercise of the power of sale, conducted the sale in good faith and obtained the best price possible at the time the sale was done. It was therefore counsel's contention that the facts of ***Epaineti Mubiru*** (supra) ***and Cuckmere Brick Finance*** (supra) are clearly distinguishable from the instant case.

I have considered the submissions of counsel for both parties on this issue, the authorities relied upon and the relevant documents. I have also looked at the relevant sections of the Registration of Titles Act, Cap. 230 (hereinafter called the RTA), the repealed Mortgage Act Cap. 229 that was in force at the time of concluding the transaction in 1992 (hereinafter called Cap.229), as well as the Mortgage Deed signed by the parties.

Section 116 of the RTA provides as follows;

> *"A mortgage under this Act shall, when registered as hereinbefore provided, have effect as security, but shall not operate as 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 part thereof respectively, or in the performance 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."

Section 117 of the RTA also provides that;

> *"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**."*** (Emphasis added).

Clause 4.6 of the Mortgage Deed provides that the mortgage debt and interests thereon shall immediately become payable without demand upon breach of the terms of the agreement including default in payment and the statutory power of sale of the bank shall forthwith be exercisable without any notice. That clause dispensed with the requirement for demand and notice. Since the applicant does not contest the validity of the Mortgage Deed she would be bound by its provisions.

Be that as it may, according to the documentary evidence on record, when the plaintiff defaulted, the 1st defendant wrote the first letter of demand on 19/03/2003 (Exhibit D4), the second one on 4/07/2013 (Exhibit D5) and the final one by the Company Secretary was written on 26/09/2003 (Exhibit D6). The final demand also indicated in the last paragraph that the whole amount had become due and should the plaintiff fail to meet the demand, the bank would proceed to enforce recovery without further notice.

It is important to note that counsel for the plaintiff did not make submission on these prior demands but concentrated on the one by the auctioneer (Exhibit P5 (D8)). From the above documentary evidence, it can be seen that the 1st defendant

was indeed very lenient on the plaintiff by giving her several demands for payment, yet the law provides for just one. I am therefore satisfied that by the time the auctioneer wrote Exhibit P5 (D8) the statutory notice stipulated under sections 116 and 117 the RTA had already been duly served on the plaintiff by the 1st defendant and I so find.

This leads me to the next question as to what the 1st defendant is entitled to under the law after all the above demands were made to no avail. It is trite law that service of notice creates a default position thereby entitling the mortgagee to exercise his right/remedy under the law to realise the mortgage debt. ***See HCCS Nos. 106,150 And 788 of 2007: Gladys Nyangire Karumu and 2 Others v DFCU Leasing Company Ltd and 3 others; Per Madrama J at page 35-36***

Section 2(1) (a) and (b) of 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 also 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. See: ***Gladys Nyangire Karumu and 2 Others*** *(supra)* at page 36.

The 1st defendant elected to appoint the 2nd defendant a receiver by letter dated 8/01/2004 (Exhibit D7) as provided under section 4 of Cap. 229. The responsibilities of the receiver are well spelt out under sections 5 and 6 of that Act. The letter of appointment also clearly stated that the 2nd defendant should sell the suit property either by public auction or private treaty. Notably, under Clause 12 and 13 of the Mortgage Deed, the plaintiff had consented to the mortgagee exercising the right of sale either by public auction or private treaty, without recourse to court, including but not limited to the choice of the purchaser and price.

Counsel for the plaintiff contended that the sale was illegal because the property was not extensively advertised and even then after the advertisement did not bring out best bids, the 2nd defendant sold the property by private treaty at a paltry Ushs. 40,000,000/= to the detriment of the plaintiff.

I have looked at section10 of the Cap. 229 which 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."*

This provision was interpreted by the Supreme Court of Uganda in the case of **Barclays Bank of Uganda v Livingstone Katende Civil Appeal No. 22/93.** The Court was considering section 9 of the Mortgage Decree as it was then referred to before the Laws of Uganda were revised and the numbering of sections changed such that that section became section 10 of Cap 229. It was held the bank did not require leave of court to realise its security since 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. Further that the power conformed to section 9 of the Mortgage Decree which did not oust the jurisdiction of court as there can be no principle of natural justice which outshines an express legislative provision such as that section.

In the instant case, the plaintiff irrevocably gave her unconditional consent to the 1st defendant or the receiver appointed to exercise its absolute and unfettered power of sale by private treaty without recourse to court in clauses 12 and 13 of the Mortgage Deed as well as the choice of the purchaser and price. The 2nd defendant as the agent of the 1st defendant duly exercised that power. It is the view of this court that there was no need for an extensive advertisement that would only increase the plaintiff's liability in a sale by private treaty. It was the testimony of the 2nd defendant that when the first advertisement did not attract many bids they decided to use land brokers to source for buyers. I therefore find that the sale of the suit property to Iga Francis in exercise of the powers given by the Mortgage Deed was lawful and this answers the first issue in the affirmative.

Issue 2: Whether the suit property was undersold?

Counsel for the plaintiff submitted on this issue that the property was undersold at only Ushs. 40,000,000/= yet the 1st defendant's valuer had put the forced sale value at Ushs. 45,000,000/= and market value of Ushs. 75,000,000/=. Counsel also submitted that moreover there were willing purchasers as per PW1's evidence to

buy the unencumbered portion of the land at Ushs. 40,000,000/= and the plaintiff had requested the 1st defendant to direct the 2nd defendant to sell the unencumbered portion but instead it directed the 2nd defendant to sell the whole portion at the same price to recover the sum of Ushs. 30,000,000/=. Counsel finally submitted that the Chief Government Valuer valued the property for stamp duty purposes at Ushs. 150,000,000/=. According to counsel, the defendants knew of the true value of the land but undersold it to their benefit and to the detriment of the plaintiff and court should so find.

Counsel for the defendants however submitted that the property was sold at the true market value prevailing and obtaining at the time considering that the property was heavily encumbered. Counsel submitted that in selling the property at Ushs. 40,000,000/= the plaintiff acted reasonably and in good faith in the circumstances of this case. Counsel cited the authority of ***Roger Michael and Others v Douglas Henry Miller and Another [2004] EWCA Civ.282*** for this submission. She also sought to distinguish some of the cases relied upon by the plaintiff for example ***Epaineti Mubiru*** *(supra) and* ***Tse Kwong Lam v Wong Chit Sen (1983) 3 All ER 55*** and invited court to answer the issue in the negative.

Counsel for the defendants urged this court to disregard the valuation done by PW2 upon the instruction of the plaintiff months after sale had taken place and the value attached to the property by the Chief Government Valuer for purposes of assessing stamp duty. She argued that PW2 did not apply any professional standards in the conduct of his service and during cross-examination revealed that his valuation was tailored to suit his client's need. Further that PW2 did not take note of the physical encumbrances on the suit land and as such did not consider them. As regards the value given to the property by the Chief Government Valuer, it was argued that first of all he was not called to testify on how he arrived at that figure which was only for purposes of stamp duty. Secondly, it was the evidence of DW4 that the Chief Government Valuer did not visit and inspect the land and so he was not mindful of the challenges affecting the land.

Counsel for the plaintiff submitted in rejoinder that the valuation of the Chief Government Valuer cannot be stated to have been for the purpose of stamp duty only but it reflects the market value of the land and court should not take the submission of counsel for the defendants that the plaintiff should have called the

Chief Government Valuer as witness yet they signed transfer and even okayed payment of stamp duty of 1% based on the said valuation.

I have reviewed the evidence (both documentary and oral) relating to this issue and carefully considered the submissions of both counsel and the authorities relied upon. As a general principle, the mortgagee owes a duty of care to the mortgagor in dealing with the mortgaged property. This was stated in ***Epianeti Mubiru v Uganda Credit and Savings Bank*** *(supra)* among other cases. In that case, Ssekandi J held inter alia at page 112, that if the Lord Atkin neighbour principle is applied there is proximity between the mortgagee and the mortgagor which gives rise to the duty to take reasonable precautions in the conduct of the sale so as to obtain the true market value from the property. His Lordship continued that the mortgagee must not only act in good faith but also act as a reasonable man would behave in the realisation of his own property so that the neighbour may receive credit for the fair value of the property sold.

I am however alive to the fact that each case should he handled according to its peculiar circumstances. I have carefully considered the unique circumstances of the instant case and wish to make the following observations which will lead me to conclude whether the defendants acted in bad faith and were negligent in carrying out the above sale as alleged.

Exhibits D4, D5 and D6 confirm that the 1st defendant sent three demand letters to the plaintiff. Exhibit D4 dated 19th March 2003 indicate that the plaintiff had defaulted on both the overdraft facility and the loan. She was asked to make good of them by 30th March 2003. After a period of more than three months, Exhibit D4 dated 4th July 2003 was written as a further reminder that the demand of 19th March 2003 had not been complied with and a new date by which the arrears were to be paid was given as 20th July 2003. On 26th September 2003, a final demand (Exhibit P6) was written wherein the last paragraph, the plaintiff was informed that if she failed to meet the demand under that communication the defendant would proceed to enforce recovery without further notice to her.

It is noteworthy that the 1st defendant did not actually act immediately much as the final demand was not complied with. The receiver was actually appointed on 8th January 2004 more than three months later.

The suit property was then advertised for sale on 8th January 2004. The appointed date of sale according to that advertisement was 8th February 2004. It was the testimony of the 2nd defendant (DW2) that the suit property remained in the market as they searched for a buyer until January 2005 when he sold it to one Iga Francis at Shs. 40,000,000/= which according to him was reasonable in the circumstances given that they had failed to get a better offer for one year and in any case, a valuer instructed by the 1st defendant had put its open market value at Shs. 75,000,000/= and a forced sale value of Shs. 45,000,000/=. He also testified that he received some offers which his client declined to accept as being low. During cross-examination the plaintiff also stated that the sale process started in March 2004 when she asked the bank to allow her get a buyer but by December 2004 she had not yet got a buyer. During re-examination she stated that she got a buyer around June 2005. This was long after the sale taken place and moreover she had taken over one year to get that alleged prospective buyer. Exhibit D32 also shows the plaintiff tried to sell other properties in Mukono jointly with the 1st defendant in a desperate effort to settle her obligation with the bank.

The above observations bring to mind the following questions: If indeed this property was as marketable as the plaintiff would have this court believe, why did she have to try to sell other properties to settle her obligation? If at all the 1st defendant was acting in bad faith, would it have sent three demand letters in a span of over six months and then after giving a final demand waited for over three months to enforce its absolute and unfettered right of sale under the Mortgage Deed? Would it and the 2nd defendant have patiently waited for a year to sell the suit property upon advertising it for sale and would they have allowed the plaintiff to look for a buyer as well? Would it have bothered to carry out a valuation of the property shortly before its sale? This court would answer all these questions in the negative based on the firm that the patience exhibited by the defendants as highlighted above is not consistent with bad faith. Instead it was in exercise of due care to ensure that the interest of the plaintiff was protected as the 1st defendant exercised its rights under the Mortgage Deed.

In any event, the plaintiff had in clause 13 of the Mortgage Deed irrevocably given her unconditional consent to the 1st defendant to choose the purchaser and price. She must have known the type of property she was mortgaging. I am not suggesting that this was a license to the defendants to negligently handle sale of the

suit property. They were still under a duty of care but the evidence on record does not support the allegation of bad faith and negligence. The 1st defendant as a mortgagee had to recover its money. It could not wait for the best offer forever.

I am persuaded by the observation of Lord Templeman in ***Downsview Nominee Ltd and another v First City Corp Ltd and another [1993] 3 ALL ER 626 at p.637*** 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"*.

Allowing the property to remain in the market for a period of one year moreover while giving the plaintiff the liberty to also look for a buyer, in my view was very reasonable time for the defendants to conclude that the property was not going to fetch any higher amount than what Iga offered. Exhibit D32 shows that the plaintiff initially did not protest the sale but only requested the 1st defendant to reduce the accrued interest to 50%. It was only when her request was declined that she filed this suit after more than one year later.

As regards the arguments on which valuation report this court should believe and rely on, I am more inclined to believe the report of the 1st defendant's valuer that the property was encumbered with squatters who even used it as a burial ground. This evidence is supported by pictures and corroborated by the evidence of DW4 which was largely based on Exhibits D20-D31 being correspondences between him and the squatters who were on the land. The plaintiff herself admitted during cross-examination that she was sued jointly with the 2nd defendant by one of the squatters although she claimed that she was not aware of any squatter.

The valuation conducted by PW2 was after a dispute over the sale had already arisen and so it was tainted with bias as it appeared too flowery. It did not take into account the encumbrances on the land as he conceded during cross-examination. He actually stated that he was required to provide valuation of the land and not what was on the land and hastened to add that they value according to the instructions of the client. He later stated that if he had valued the suit property in December 2004 he would have given an open market value of 45,000,000/= per acre and a forced sale value would be about 80% of that per acre without taking

into account other factors. This implies that the value would have been much lower if the encumbrances were taken into account.

PW2 did not strike me as a serious professional when he said that encumbrances like graves add value to land and yet he claims to be a land broker as well. His evidence was that he did not open the boundary of the land he was valuing to verify whether the size stated in the certificate of title was what was on the ground. In fact when PW2 was asked in cross examination whether he had taken pictures of the suit property, his answer was that he did not recall taking pictures but these days he does because he is serious implying that he was not serious at the other time. Can this court then rely on the report of such self professed unserious person?

As regards the value assigned to the property by the Chief Government Valuer, I am also inclined to agree with the defendant's argument that it was merely for purposes of assessing the stamp duty and so this court cannot rely on it to determine the value of the suit property. There is no evidence to show that it was based on actual valuation of the property as opposed to estimates. DW4 as the buyer testified that he did not take the Chief Government Valuer to the property for purposes of valuing it. It was his testimony in re-examination that he paid the stamp duty in protest because his surveyor advised him that he would incur more costs by taking the Chief Government Valuer to inspect and value it.

On the argument that the defendants should have severed the unencumbered portion of the land and sold as advised by DW3, it is the view of this court that the defendants were under no duty to do that. In any event, the plaintiff had been given a go ahead to do so but according to Exhibit D32, she only managed to get a prospective buyer for one acre long after the sale of the property had taken place.

All in all the plaintiff has failed to satisfy this court on a balance of probability that the suit property was undersold by the defendants as the evidence on record instead confirm that they did the best they could to get the best price in the peculiar circumstances of this case. This answers the 2nd issue in the negative.

Issue 3: Remedies

In view of my findings on the above two issues, the plaintiff is not entitled to any of the remedies she prayed for. In the result, this suit is dismissed with costs to the defendants.

I so order.

Dated this 17th May 2013.

Hellen Obura

JUDGE

Judgment delivered in chambers at 4.00 pm in the presence of:

1. Mr. David Kaggwa for the plaintiff
2. Mrs. Olivia Kyalimpa Matovu
3. Mrs. Jeane Francis Nakamya the plaintiff

JUDGE

17/05/13