

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

**ORIGINATING SUMMONS NO. 6 OF 2011**

**BARCLAYS BANK OF UGANDA .....  
APPLICANT**

**VERSUS**

**1. JOSHUA WILBER MUSIMAMI  
2. MUJOWI INVESTMENTS (U) LTD ..... RESPONDENTS**

**BEFORE: HON. LADY JUSTICE FLAVIA SENOGA ANGLIN**

**RULING**

By this application brought under 0.37 rr 4 and 8 of the C.P.R, the Applicant Bank, the legal mortgagee applied to this court for determination of the questions set out as numbers 1-3 in the summons.

It can be discerned from the summons that the Applicant advanced to the First Respondent (mortgagor) and Second Respondent (Principal Debtor) credit facilities of shs. 160,000,000/-. This was at the request of the Respondents, who secured repayment by mortgaging the property comprised in LRV 3547, Folio 2, Plot 4134, land at Masajja.

The Respondents defaulted in repayment of the principal and interest secured under the mortgage.

The Applicant took out these summons seeking court to determine:

- Whether the Applicant (mortgagee) is entitled to foreclose and sell the mortgaged property of the mortgagor, to recover all the sum of money due in respect of the principal debt, interest and other incidental charges.
- Whether the Applicant is entitled to sell the said mortgaged property by private treaty or public auction to recover the entire sum due to it together with costs and expenses related thereto.
- Whether the Applicant is entitled to vacant possession of the mortgaged premises and if so whether the Applicant is entitled to evict the First Respondent / and his agents or anyone claiming under him from the said mortgaged premises and handover possession thereof to a purchaser for value or from the Respondents as mortgagor and principal debtor to deliver possession of the property to the Applicant or purchaser.

The summons were issued on 07.09.11 and the matter was adjourned to 06.12.11 for hearing.

By that date, the Defendant had not been served and matter was adjourned to 05.04.12 for hearing. The Applicant was directed to effect service on the Respondent (Defendant) and an affidavit of service filed.

On 05.04.12, court again directed service of the summons on the Advocates of the Respondents and to also notify them that they had to file affidavit in reply within 14 days from the date of service. The matter was fixed for mention on 02.07.12.

The matter was next called on 10.06.14, when it was directed that hearing notices issue for 01.07.14.

On 01.07.14, only Counsel for the Applicants was in court. Although he referred to the affidavit of service, court discovered that the affidavit of service had neither date of swearing or commissioning.

Counsel for the Applicants then informed court that there had been a challenge in reaching the Respondents. He added that the lawyers on record had delivered service on the ground that they had no more instructions in the matter. Court directed that Respondents be served through advertisement in a widely read newspaper. The matter was the adjourned to 14.07.14.

On 14.07.14, Counsel for the Applicants was in court but Respondents were absent. He informed court that Respondents had been served as directed. A copy of the advertisement in the New vision Newspaper of 08.07.14 was attached.

The application was heard under the provisions 0.9 r 1 (a) C.P.R.

The grounds of the application were cited by Counsel for the Applicant, pointing out the paragraphs in the supporting affidavit. He added that all demands for payment, the statutory notice and newspaper adverts for sale - Annextures D, E and F had been ignored by the Respondent. And that the Respondents had further refused to yield vacant possession of the property to facilitate the process of sale.

Counsel prayed for court to invoke its powers under 0.37 r 4 C.P.R to issue the orders prayed for.

Under 0.37 r 4 C.P.R, any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the **right to foreclose** or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before a judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require; that is to say, **sale, foreclosure**, delivery of possession by the mortgagor, redemption, reconveyance or delivery of possession by the mortgagee.

Under the above provisions, the bank as mortgagee is entitled to foreclose and sell the mortgaged property of the mortgagor to recover all the money due in respect of the principal debt, interest and other incidental charges.

While the money due was covenanted to be paid by the principal debtor, under the mortgage deed executed between the parties, this provision does not affect the bank or in any way preclude the bank from enforcing or having recourse to allow any remedies or means for recovering payment thereof which may be available under the deed or at such times and in such manner as the bank shall think fit - Clause 8 (b) Paragraph 5.

The deed further conferred upon the Bank (mortgagee) the statutory power of sale at any time without service of any other notice on the mortgagor or elapse of any further period after payment of the monies secured has been demanded and mortgagor has defaulted in payment of the same.

It is not disputed in this case that the Respondents defaulted in repayment of the principal sum and interest secured under the mortgage. The Applicant is therefore entitled to sell the mortgaged property.

The sale shall be by private treaty to recover the entire sum due to the Bank, together with costs and expenses related thereto - as per Clause 8 (b) Paragraph 6 - of the Mortgage Deed. - All costs, charges and expenses incurred or suffered by the bank or in anywise in connection with the assertion or defence of the Bank's rights under this mortgage shall be paid by the mortgagor or principal debtor or shall be charged on the mortgaged property.

Since court has found that the Bank is entitled to sale the property, it follows that it is also entitled to vacant possession of the mortgaged premises. The Respondents were served with these summons that were issued on 07.09.11 and to date there has been no response from the Respondents. Their Advocates

withdrew from the matter on the grounds that they had no more instructions in the matter. The Respondents were then served by way of substituted service through advertisement in the newspaper but still they did not appear at the hearing. - See New Vision Newspaper of 08.07.14.

Though the premises is a residential home, the wife of the First Respondent consented to the mortgage as indicated by Annexure "C" to the application and there appears to be no other action taken by her to stop the sale. The Applicant bank is accordingly entitled to receive vacant possession of the premises from the mortgagor and principal debtor.

The all those reasons, all the issues raised in the originating summons are answered in the affirmative. Application is accordingly allowed.

Costs of the application are also granted to the Applicant.

**Flavia Senoga Anglin**  
**JUDGE**  
**20.08.14**