

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

HC OS NO 10 OF 2014

IN THE MATTER OF KYADONDO BLOCK 192 PLOT 1729 LAND AT BUWATE

AND

**IN THE MATTER OF A LEGAL MORTGAGE OVER THE SAID PROPERTY IN FAVOUR
OF GT BANK (U) LTD (FORMERLY FINA BANK (U) LTD)**

AND

**IN THE MATTER OF AN APPLICATION FOR FORECLOSURE AND SALE OF THE
MORTGAGED PROPERTY**

BETWEEN

GT BANK UGANDA LTD (FORMERLY FINA BANK (U) LTD)PLAINTIFF

VS

- 1. RICHLINE INTERNATIONAL LTD}**
- 2. RICHARD MUHANGI}.....DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Plaintiff commenced this action by originating summons under Order 37 rule 4 of the Civil Procedure Rules for determination of certain issues and for foreclosure of the Defendant's right to redeem the mortgaged property.

Briefly it is stipulated in the originating summons that the first Respondent/Defendant obtained a loan facility of Uganda shillings 100,000,000/= and an overdraft facility of Uganda shillings 80,000,000/= with the consent of the

second Defendant who is also the registered proprietor of Kyadondo Block 192 Plot 1729 referred to as the suit property. In compliance with the Mortgage Act 2009, the Plaintiff executed a legal mortgage and further charge over the said property. In the premises seeks a determination of the following questions/issues:

1. Whether the Plaintiff as the legal mortgagee is entitled to foreclose and sell the mortgaged property to recover the entire amount due to it in respect of the principal amounts, interest, costs and all other charges related arising from the first Respondent's loan.
2. Whether the mortgagee is entitled to sell the property by private treaty or public auction.
3. Whether the Plaintiff/mortgagee is entitled to vacant possession of the property and if so, whether the Plaintiff/mortgagee is entitled to evict the second Respondent and his tenants from the property and hand over vacant possession thereof to a purchaser for value.
4. Whether the Plaintiff should be granted costs of the suit.

The Plaintiff also prays for declarations and orders from the court.

The first order sought is that the mortgagor's right to redeem the suit property be foreclosed. Secondly the mortgagee should be permitted to sell the mortgaged land upon foreclosure in accordance with the laws. Thirdly the Plaintiff prays for a declaration that it is entitled to vacant possession of the mortgaged property and entitled to evict the second Defendant and his tenants from the property and hand over vacant possession thereof to a purchaser for value. The Plaintiff also seeks any other consequential relief as the court may deem fit or equitable to grant and for the costs of the suit to be paid by the Defendant/mortgagor.

The Defendants on the other hand assert that they are not indebted to the Plaintiff and that there were not served with demand notices. The reply of both Defendants is contained in the affidavit of Jackline Muhandi, a director in the first Defendant and the wife of the second Defendant duly authorised by the second Defendant to depose to the affidavit on his behalf. The Defendants aver that the suit is frivolous and vexatious and ought to be dismissed.

At the hearing the Plaintiff was represented in the proceedings by Counsel Angela Kobel of Messrs Tibeingana and Co. Advocates while the Defendants were represented in the proceedings by Counsel Kandebe Ntambirweki of Messrs Ntambirweki Kandebe and Company Advocates. Both Counsels addressed the court in written submissions and the deponents were not cross examined on matters of fact.

The Plaintiff's submissions

The Plaintiff's submissions are that this suit was brought under Order 37 rule 4 of the Civil Procedure Rules to foreclose the second Respondent's right to redeem the mortgaged property. After making reference to the facts the Plaintiff's Counsel addressed the court on the three issues in the notice of motion:

1. Whether the Plaintiff is entitled to foreclose and sell the mortgaged property to recover the entire amount due to it in respect of the principal amounts, interest, costs and all other charges arising from the first Respondent known?

On the basis of the facts averred in support of the originating summons which will be considered below, the Plaintiff's Counsel submits that the Defendants do not dispute obtaining a loan and overdraft facility from the Plaintiff/mortgagee. Their claim in the affidavit in reply that the entire amount was paid off is not supported by any evidence of payment. Secondly the allegation of non-service of the notices does not suffice or is untrue as all the notices were duly served on the Defendants/mortgagors either personally or at the address of service availed to the bank at the time of applying for the loan and overdraft facility. It is now over two years since the first Defendant/mortgagor was served with the notice of default and the loan remains outstanding.

Under Order 37 rule 4 of the Civil Procedure Rules, any mortgagee 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 foreclose or redeem any mortgage whether legal or equitable may take out as a 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. It mortgagee may apply to court to foreclose the right of the mortgagor to redeem the mortgaged land at any time of breach of the covenant to pay. If the mortgagor fails to pay, the court shall order that the mortgagor is foreclosed of his or her right to redeem the mortgaged land and the land may be offered by the mortgagee for sale.

In this particular case the Defendants did not make good on its loan repayment obligations and notices of default and notice of sale were served on the Defendant but he did not take heed. To that extent after a notice has been served on the mortgagor as prescribed by section 19 (2) of the Mortgage Act, and the mortgagor does not take heed, the mortgagee may in accordance with section 20 of the same Act exercise the option of selling the mortgaged property.

The Plaintiff/mortgagee complied with the Mortgage Act and gave sufficient notice to the Defendants but the mortgagors did not make good the repayment obligations. The property was advertised as required by the law but the Defendants did not bother to settle the amounts due and owing to the mortgagee but resorted to deploy police patrols to frustrate the process of the Plaintiff evicting and taking possession of the mortgaged property. According to the case of **Global Trust Bank versus Frank Mugisha HCCS 005 of 2012**, foreclosure makes the mortgagee the absolute owner of the property given as security. Upon default of the borrower the mortgagee is entitled to commence foreclosure proceedings.

The summary of the case is that the Defendant took the loan facility from the Plaintiff/mortgagee and pledged as security land comprised in Kyadondo block 190 to plot 1729 registered in the names of the second Defendant/mortgagor and the Plaintiff registered a legal mortgage and further charge and the instrument numbers thereof are KLA 512 342 and the KLA 230974 respectively. In the premises the Plaintiff is entitled to foreclose the right of the mortgagor to redeem the property and sell the mortgaged property to recover the entire amount due to it in respect of the principal amount, interest on the principal amount, costs and all related charges arising from the first Respondent's loan.

2. Whether the Plaintiff/mortgagee is entitled to vacant possession of the property and if so whether the Plaintiff/mortgagee is entitled to evict the second Respondent and his tenants from the property and hand over vacant possession thereof to a purchaser for value?

The Plaintiff's Counsel emphasised the fact that notices were served on the Defendant and no rectification of the default of the Defendants was done. The conduct of the Defendants entitles the Plaintiff to the remedy provided for under section 26 of the Mortgage Act which authorises the mortgagee to sell the mortgaged property if there was no rectification of the default within the prescribed time notified. Since 9 March 2012 the Defendants have been aware of the default, and demanded notices were issued on 7 March 2013, 1 October 2013, 2 February 2014, 24th of April 2014 and 31st of July 2014 respectively and all of them were ignored.

The Defendants are indebted to the Plaintiff in the amount of **Uganda shillings 290,921,763/=** which includes the principal, interest, costs and other related charges by the 31st of May 2014 as averred in the originating summons and verified by the affidavit in support by the Credit Manager of the Plaintiff/mortgagee.

The Defendant's failed to comply with the terms of the credit facility and the mortgage deed and failed to pay the agreed 36 monthly instalments for over one year. The Plaintiff has proved by way of mortgage deed, bank statement, notices served on the Respondents, the registered charge and being in possession of the Defendant's original certificate of title. Counsel prayed that the court dispenses with the grace period for the Defendants to redeem the property due to their conduct. She submitted that it would be inequitable and unfair to give the Defendant another six months within which to redeem the property because the Defendants had not honoured the previous notices from March 2013 up to date. Whoever comes to equity must come with clean hands which the Defendant has not done in this case.

In the case of **Commercial Micro Finance Ltd versus Dovia Edgar Kayondo HCCS 2012 of 2006**, it was held that it would be inequitable to give the Defendant another six months in which to make payment before the Plaintiff is granted a remedy when it was close to 2 years from the date the debt became due. The Plaintiff ought to be granted the remedy of selling the property by private treaty or public auction.

Because of the default of the Defendants the Plaintiff is entitled to vacant possession of the property.

3. Whether the Plaintiff should be granted costs of this suit?

The Plaintiff's Counsel relies on section 27 (2) of the Civil Procedure Act which gives this court wide discretion in the award of costs. The Plaintiff also relies on the case of **SDV TRANSAMI (U) Ltd versus Nsibambi Enterprises (2008) HCB** at page 94. She submitted that in this case the costs should follow the event and are awarded to the Plaintiff.

In conclusion the Plaintiff is entitled to foreclose the right of the Defendant to redeem the property and sell the mortgaged property to realise the amount due. Secondly the Plaintiff is entitled to vacant possession of the mortgaged property and to have the mortgagor and his tenants evicted. Costs of this suit should be awarded to the Plaintiff.

The Defendant's Submissions

In reply the Defendant's Counsel agrees with the facts. On 10 August 2011, the mortgagee advanced a loan facility of Uganda shillings 100,000,000/= and an overdraft facility of Uganda shillings 80,000,000/= to the first Defendant/mortgagor which was secured by land comprised in Kyadondo block 192 plot 1729 registered in the names of the second Defendant.

The Respondents/Defendants signed a tripartite mortgage deed in favour of the mortgagee and the mortgagee registered a legal mortgage and further charge under instrument number KLA 512342 and KLA 230974.

Subsequently while exercising its powers of write off, the Plaintiff forgave the debt and wrote it off as a bad debt. The write -off was communicated to the mortgagors who were informed that they would not pay the loan and overdraft. The Defendants acted on this representation from the Plaintiff and understood that the loan and overdraft had been written off. To the Defendant's surprise, the Applicant all of a sudden started to demand the debts, issued demand notices and brought the current suit. The Defendant's who had already acted on the Plaintiffs representation of a set-off did not pay the loan and overdraft as the same had been written off or waived.

1. Whether the Plaintiff as a legal mortgagee is entitled to foreclose and sell the mortgaged property to cover the entire amount due to it in respect of the principal amounts, interest, costs and all other charges related arising from the first Defendant's loan.

The Defendant's Counsel relies on the depositions of Jackline Muhangi, a director of the first Defendant to the effect that the Defendants were never served with any demand notice. On the basis of that she deposes that the Plaintiff's claim is frivolous, vexatious and untenable at law. The Defendant's contention is that the Plaintiff is not entitled to foreclose and sell the mortgaged property. The purported loan and overdraft the Plaintiff is claiming were written off at the Plaintiff's own will.

The term "writing off" is defined by Black's Law Dictionary 8th edition page 1641 as: "to remove from books," Oxford Advanced Learners Dictionary, 6th Edition page 1561 defines it as: "an act of cancelling a debt and accepting that it never be paid." Finally it is also defined by www.investopedia.com as "uncollectible debt that is written off by the company and recorded as a loss by the accountants."

The Defendants Counsel further submitted that the common law principles of contract including representations/misrepresentation, apply in the relationship between a banker and customer such as between the Plaintiff and the Defendants according to the case of **Esso Petroleum Co Ltd versus UCB SCCA number 14 of 1992 and Mobil (U) Ltd versus UCB (1982) HCB 64**. The Plaintiff through qualified

employees represented to the Defendants that the loan and overdraft had been written off. The Defendant honestly acted on this representation and used the money which would have paid the debt to do other things. The Plaintiff cannot turn around and start demanding from the Respondents. The evidence of the write-off is annexure "I" of the Applicant's originating summons. The Defendant's loan and overdraft were written off on 3 July 2013. Further demonstrate that the Defendant's loan was written off, there was a deposit of 30,000,000/= on the account which was later transferred. Secondly for the mortgagor to be liable, the principal debtor should be liable. Because the principal debtor is not liable on account of the write-off, the subsidiary is not liable.

Issue 2:

2. Whether the Plaintiff is entitled to sell the property by private treaty or public auction?

The Defendants Counsel reiterated submissions on the first issue. Secondly because the Plaintiff did not serve the Defendant a notice of default, the requirements of section 19 of the Mortgage Act and Regulations 19 of the Mortgage Regulations were not complied with. The notice of sale is not addressed to the mortgagor. Therefore the Plaintiff did not comply with the Mortgage Act in order to exercise the right of sale.

The purported notice of sale was addressed to lawyer Adoch Luwum and is misconceived. There is no evidence that the said lawyer is the Defendant's lawyer.

In the alternative and without prejudice the Mortgage Act 2009 provides that sufficient notice be given to the mortgagor before the right of sale is exercised. Section 26 (2) of the Mortgage Act provides that before exercising the power to sell the mortgaged land, the mortgagee shall serve the notice of sale in the prescribed form on a mortgagor and shall not proceed to complete any contract for the sale of the mortgaged land until 20 working days have lapsed from the date of the service of the notice to sell. The Plaintiff offended the cardinal requirement of the law because it did not give notice of sale to the mortgagor. Instead the notice was addressed to other parties who are not agents of the

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Defendant and completely alien to the whole transaction according to annexure "G" to the originating summons. This suit is therefore premature and frivolous. The Plaintiff omitted the initial procedural steps that are provided for under the Mortgage Act inclusive of giving notices to the Respondents. The requirement of notices is mandatory under the Act and was not complied with by the Plaintiff. Counsel prayed that this court finds that the proper notices were not served on the Defendants and therefore the Plaintiff is not entitled to sell the mortgaged land either by public auction or private treaty and the issue should be resolved in favour of the Defendants.

3. Whether the Plaintiff is entitled to vacant possession of the property and if so, whether the Plaintiff is entitled to evict the second Defendant and his tenants from the property and hand over vacant possession to a purchaser for value?

The Defendant's submission is that the Plaintiff is not entitled to vacant possession of the suit property. This is on the same ground that the loan and overdraft were written off by the Plaintiff. The Defendant is not in any way indebted to the Plaintiff. In the premises the Plaintiff is not entitled to evict the Defendants. It is the Plaintiff who wrote off the loan and overdraft and the suit is only an afterthought.

4. On the fourth issue the Defendants Counsel prays that this suit is dismissed with costs to the Defendants on the basis of the submissions on the other issues.

Rejoinder of the Plaintiff

In rejoinder the Plaintiff's Counsel reiterated earlier submissions and prayers. She contends that no negotiations were ever conducted between the Plaintiff and the Defendants and the court should proceed to give its judgment in the matter.

The Defendants defaulted since January 2013 on their repayment obligations resulting in an outstanding amount of Uganda shillings 290,021,763/=. The Defendants were duly served with a demand notices and the first Defendant is

aware of its indebtedness to the Plaintiff consequently the action is not frivolous, vexatious or untenable in law. The Defendants were served on 7th of March 2013 and the notice was received on 9 March 2013. On 1 October 2013 the Defendants were served again on the known address and did not comply. On 2 February 2014 the Defendants were served with notice to reinstate the sale of the mortgaged property but they did not comply. On 24 April 2014 the Plaintiff recalled the entire credit facility and re-advertised the property at page 32 of the Daily Monitor of Thursday, April 24, 2014 and the appointed date of sale was 30th of May 2014. The Defendant's had defaulted and were duly served with demand notices on 9 March 2014 consequently it is not true that the Defendants were not served.

The Plaintiff is entitled under Order 37 rule 1 of the Civil Procedure Rules to apply to foreclose the right of the mortgagor to redeem the mortgaged property.

With regard to the submission on the writing off of the loan, it is a fishing expedition intended to mislead the court. Annexure "I" relates to the first Defendant bank statement. The Defendants never made any single deposit and on 3 July 2013 a cheque which was issued by them bounced. There is no written communication of writing off of the loan. The rights and obligations of the parties can be determined by a perusal and interpretation of the mortgage deed. The Plaintiff has met the standard of proof which is on the balance of probabilities.

As far as issue number two is concerned the Plaintiff is entitled to sell the property by private treaty or public auction as prayed for. On the basis of the notices referred to, the Plaintiff complied with the Mortgage Act and has a right to sell the mortgaged property. The notices were served on the Defendants and not Counsel Adoch Luwum according to annexure "C", "D", "E", "F", and "H" attached to the affidavit in support of the originating summons. The Plaintiff did not omit an initial procedural step.

As far as issue number 3 is concerned the Plaintiff is entitled to vacant possession of the suit property on the basis of the submission that the Defendants are in default and were duly served with the requisite notices.

As far as issue number 4 is concerned the Plaintiff's Counsel reiterated her submission that section 27 (2) of the Civil Procedure Act gives the court wide discretion in the award of costs. She submitted that costs should follow the event.

Ruling

I have carefully considered the pleadings of the Plaintiff and the Defendant as well as the affidavit evidence containing the documentary attachments and the submissions of Counsel.

The background to this suit is mainly contained in the affidavit evidence attached to the originating summons deposed to by Credit Manager of the Plaintiff, Mr. Charles Elong.

The first Defendant obtained a loan facility of Uganda shillings 100,000,000/= and an overdraft facility of Uganda shillings 80,000,000/= with the consent of the second Defendant who is the registered proprietor of Kyadondo Block 192 Plot 1729 land at Buwate and referred to as the mortgaged or suit property. This relationship is evidenced by annexure A1” being a banking facility letter dated 10th August 2014 for a “demand Loan” of Uganda shillings 100,000,000/= duly executed by the Plaintiff as well as the directors of the Defendant Muhangi Richard and Jackline Muhangi. Secondly there is a banking facilities letter annexure “A2” dated 29th of September 2011 for Uganda shillings 80,000,000/=, being an overdraft facility also duly executed by the parties. In annexure “B1” to the affidavit in support the parties executed a mortgage deed for Kyadondo Block 192 Plot 1729 registered in the names of Richard Muhangi, the second Defendant. The deed is executed by the mortgagor, the principal debtor and the bank. Annexure “B2” is a further charge likewise duly executed. There is a legal mortgage and further charge over the mortgaged property as security for the two loans. The title deed is annexure “B3” and proves that the mortgage in favour of FINA Bank was registered under instrument KLA512341 on the 16th of August 2011 while the further charge was registered on the title deed on the 11th of January 2012 under instrument KLA530974.

The affidavit of Charles Elong, the Credit Manager of the Plaintiff further deposes to the following facts. On the 7th of March 2012 the mortgagee served upon the mortgagor a demand notice to pay the outstanding loan and overdraft facility in accordance with the mortgage agreement but no payment was made. Due to the neglect to heed to the demand notice, the Plaintiff on 1 October 2013 served the Respondent with a notice of sale of the mortgaged property. Again on 2 February 2014, the Respondents were served with a notice of reinstatement of the notice of sale of the mortgaged property. Following the continuous neglect by the Defendants despite reminders, the Plaintiff recalled the credit facility and subsequently had the property advertised on 24 April 2014. Upon lapse of 30 days as stipulated in the newspaper advertisement, the Defendants were served with a notice of eviction. On 31 July 2014 the Defendant were served with notice by the mortgagee to take possession of the mortgaged property but the notice was ignored by the Defendants. Since January 2013 there has not been a single deposit on the account and by the 31st of May 2014 the amount due and owing on the account stood at **Uganda shillings 290,921,763/=**.

The Defendant/mortgagor refused or ignored or neglected to vacate the suit property and instead resorted to the deployment of police patrols to frustrate the eviction process. In the premises the Credit Manager avers that it is just and equitable that the suit succeeds.

The reply of both Defendants is contained in the affidavit of Jackline Muhangi, a director in the first Defendant and the wife of the second Defendant duly authorised by the second Defendant to depose to the affidavit on his behalf.

She asserts that she read and understood the affidavit of Charles Elong in support of the originating summons. It is not true that the Defendants owe any money or that they are indebted to the Plaintiff/mortgagee as alleged. It is not true that any demand notice or alleged documents were ever served on the Defendants as alleged since there is no indebtedness as claimed by the Plaintiff. Lastly she deposes that the averment of Mr Charles Elong that whatever he had stated is true and correct to the best of his knowledge and belief at paragraph 13 of the affidavit in support of the originating summons is false. On the basis of the above

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deposition, the Plaintiff's suit is frivolous, vexatious and untenable in law and ought to be dismissed with costs to the Defendants.

The questions for determination in the suit are:

1. Whether the Plaintiff as the legal mortgagee is entitled to foreclose and sell the mortgaged property to recover the entire amount due to it in respect of the principal amounts, interest, costs and all other charges related arising from the first Respondent's loan.
2. Whether the mortgagee is entitled to sell the property by private treaty or public auction.
3. Whether the Plaintiff/mortgagee is entitled to vacant possession of the property and if so, whether the Plaintiff/mortgagee is entitled to evict the second Respondent and his tenants from the property and hand over vacant possession thereof to a purchaser for value.
4. Whether the Plaintiff should be granted costs of the suit.

I have carefully considered the Defendants defence to the Plaintiff's suit. An originating summons is a suit and the person commencing the action is the Plaintiff while the person against whom the action has been brought is the Defendant. Throughout the written address to court, the Plaintiff's Counsel and the Defendant's Counsel referred to the parties as Applicant and Respondent respectively. However I refer to them as the Plaintiff and the Defendants respectively. The Defendants both in the affidavit in reply of Jackline Muhangi as well as in the submissions raise a preliminary point of law to the effect that the action is frivolous and vexatious. The basis of the objection is on their assertion of fact that the Plaintiff had written off the loan obligations of the Defendants. There was no attachment of any kind to the affidavit of Jackline Muhangi. Instead in the written submissions the Defendants Counsel relies on annexure "I" to the affidavit in support of the originating summons. The point can be made on the premises

that there is no cause of action against the Defendants because no money is owed the Plaintiff.

I have carefully gone through annexure "I" which is a bank statement dated first of January 2012 to 25th of September 2013 and comprises of a statement of account for Messieurs Richline International Ltd, the first Defendant to this suit. The statement ends at page 6 but has handwritten additions after the printed statements indicating at the end of the statement that by the 31st of May 2014 the amount outstanding on the loan account of the first Defendant is **Uganda shillings 290,921,763/=**. At page 6 of the statement and without the handwritten notes, on 29 December 2012 there at the typescript words "write off" of Uganda shillings 94,543,941/=. Again on 29 December 2012 there are words in the description column "charge off" and the amount of Uganda shillings 94,543,941/= appears while the balance is indicated as 94,543,941/=. On the same day they are the words "write down" with an amount of zero and the balance at the end of the row is indicated as Uganda shillings 94,543,941/=. Below is a total and it is indicated as zero. However additional notes are written in handwriting and it is indicated that the principal amount by 29 December 2012 was Uganda shillings 94,543,941/=. The accrued interest is 33,278,437/= while penalty charges amount to Uganda shillings 5,496,352/=. In the handwriting further calculations are made which end up with the sums payable by the 31st of May 2014 being Uganda shillings 290,101,763/=. Whereas the bank statement is a computer printout, there is no information about the additional handwriting superimposed on the printout which allegedly has the outstanding amount.

The affidavit of Jackline Muhangi paragraph 3 thereof deposes as follows:

"That in reply to paragraphs 2, 3, 8, 9, 10, 11, and 12, it is not true that the Respondents owe any money or that they are indebted to the Applicant mortgagee as alleged."

The affidavit of Jackline Muhangi was filed on the court record on 29 September 2014. Subsequently the Plaintiff did not file any affidavit in rejoinder to that of Jackline Muhangi. In other words there is a controversy based on the bank

statement Annexure "I" about the author of the handwritten notes which gives the indebtedness of the Defendant company. On the other hand the printout of the bank statement ends with a total of zero and the words "write off" have not been clearly explained in any affidavit in reply or rejoinder. None of the Counsel applied to cross examine any of the deponents and the court was addressed in written submissions. I have further critically considered the demand notices annexure "C". The printout of the bank statement stops on 29 December 2012 and the rest of the writings on the bank statement is under somebody's hand and got up to May 2013. Consequently in the absence of any explanation about the statement beyond 29 December 2012 which is not a printout, there is a very unsatisfactory state of affairs.

Affidavit evidence should be clear and not controversial. Particularly the procedure by originating summons is not meant to deal with controversial facts. For that reason Order 37 rule 10 of the Civil Procedure Rules provides that:

"On the hearing of the summons, if the parties do not agree with the correctness and sufficiency of the facts set forth in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he or she may deem necessary and may give such directions as he or she may be just for the trial of any issues arising upon the summons, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties."

It is apparent that in the submissions of both Counsels there are contested facts based on affidavit evidence which facts cannot be resolved without cross examination. Last but not least Order 37 rule 11 of the Civil Procedure Rules gives the court powers on hearing the originating summons to adjourn the hearing into court for taking evidence viva voce or hearing arguments if it appears to the judge that the matters in respect of which relief is sought cannot be properly disposed of in a summary manner. The judge may refuse to pass any order on the summons and may dismiss it referring the parties to a suit in the ordinary course and making such orders as to costs as may appear to be just. The question is

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whether the matters raised as to the indebtedness of the first Defendant as well as the notice of adequacy of notice under section 19 of the Mortgage Act can be disposed of in a summary manner.

The object of the Originating Summons Procedure rules were considered in the case of **Kulumbai Gulamhussein Jaffer Ramji and another v Abdulhussein Jaffer Mohamed Rahim, Executor of Gulamhussein Jaffer Ramji, Secretary, Wakf Commissioners, Zanzibar and others [1957] 1 EA 699** by Windham CJ at page 701 and quoting from an earlier case on general principles applicable to originating summonses when he said:

“And I would also refer to the following passage from a judgment of my own in Salehmohamed Mohamed v. P. H. Saldanha (3), Kenya Supreme Court (Mombasa) Civil Case No. 243 of 1953, (unreported), where the scope and general purpose of procedure by way of originating summons were being considered:

“Such procedure is primarily designed for the summary and ‘ad hoc’ determination of points of law or construction or of certain questions of fact, or for the obtaining of specific directions, usually for the safeguarding or guidance of persons acting in a fiduciary capacity or acting under the general directions of the court, such as trustees, administrators, or (as here) the court’s own execution officers. That despatch is an object of the proceedings is shown by O. XXXVI, which provides that they shall be listed as soon as possible and be heard in chambers unless adjourned by a judge into a court.”

Those general observations were concerned with the Kenya Civil Procedure Rules relating to originating summonses, which correspond in all essential particulars with those of Zanzibar, and they apply with equal force to the latter.”

Apart from there being a clear controversy of fact as to the bank statement annexure “I”, there are unsatisfactory matters relating to service of demand notices. The first demand notice to pay the outstanding amount is dated 7th

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March 2012. The total outstanding amount demanded is 200,565,516/= Uganda shillings. This was received according to an acknowledgement dated 9th of March 2012 by someone signing as Richard Muhangi (the second Defendant). The Defendants were given 5 days from the date of notice to pay up the outstanding amount. The demand notice is annexure "C". Annexure "D" is a notice of sale under the Mortgage Act dated 25th September 2013 more than one year later and the outstanding balance is indicated as Uganda shillings 254,213,550/=. Subsequently there are other notices reinstating the notice of sale of property annexure "E".

I have considered submissions about compliance with the provisions of the Mortgage Act, Act 8 of 2009 on the question of whether the statutory requirements for a demand notice were met.

Powers of a Mortgagee are provided for under Part V of the Mortgage Act. Section 19 (1) of the said Act stipulates that where money secured by a mortgage is made payable on demand, a demand in writing shall create a default in payment. Secondly under section 19 (2) where the Mortgagor is in default of any obligation to pay the principal sum on demand or any interest or other relief payment or part of it under a mortgage, or in the fulfilment of any common condition, express or implied in the mortgage, the Mortgagee may serve to the Mortgagor notice in writing of the default and require the Mortgagor to rectify the default within 45 working days. However, the notice has to be in the prescribed form under section 19 (3) of the Mortgage Act. The remedy of a Mortgagee includes under section 20 of the Mortgage Act upon default of the Mortgagor to comply with the notice, issued and served under section 19, the right to require the Mortgagor to pay all monies owing on the mortgage; appoint a receiver of the income of the mortgaged land; lease the mortgaged land; enter into possession of the mortgaged land or sell the mortgaged land.

Section 26 of the Mortgage Act provides that where the Mortgagor is in default of his or her obligations under the mortgage and remains in default after expiry of the time provided for the rectification of the default stipulated in the notice

served on him or her under section 19, a Mortgagee may exercise his or her power of sale of the mortgaged land.

The demand notice gives a notice of 5 days and not 45 days as prescribed by Section 19 (3) of the Mortgage Act and it is not in the prescribed form. The remedy of foreclosure under section 20 (e) of the Mortgage Act which gives the Mortgagee powers of sale as a remedy as well as making provision for the mortgages power of sale under section 26 of the Mortgage Act cannot be exercised in the absence of evidence of fulfilment of the requirements of section 19 (1) and (3). A default has to be established and time of 45 days given for rectification of the default. This supposes evidence of service of the prescribed notice in a prescribed form.

The requirement to prove default and notice are not couched in mandatory language because the Mortgagee has other remedies and does not have to give notice of default and time to rectify the default. The other remedies are provided for under section 20 and include requiring the Mortgagor to pay all monies owing to the Mortgagee, appointment of a receiver of the income of the mortgaged land, leasing the mortgaged land or making a sublease of the mortgaged land where it is a leased property, entering into possession of the mortgaged land or selling the mortgaged land.

Where a Mortgagee chooses to exercise the option of selling the mortgaged land, he has to prove that the Mortgagor is in default of his or her obligations and that the Mortgagor remained in default at the expiry of the time provided for the rectification of the default in the notice served on him or her under section 19 (3) of the Mortgage Act.

In my opinion the matters raised in the affidavits contain insufficient facts to make the order prayed for in the suit. On the basis of the facts and controversies raised, as well as the submissions of Counsel, the suit is not appropriate for disposal in a summary manner. Exercising powers of the court under Order 37 rule 11 of the Civil Procedure Rules, I will not dismiss the suit but direct that the parties appear for hearing of the suit as an ordinary suit and not have it disposed of in a

summary manner. The suit will be fixed for a scheduling conference to consider any need of amendment and to fix it for hearing viva voce. Costs of the OS incurred thus far are costs in the cause.

Ruling delivered in open court the 12th day of December 2014

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

None of the parties in court.

An assistant from Messrs Ntambirweki Kandebe and Company in Court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

12/12/2014