THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - CS - 0330 - 2010

JOHN BAGUMA AND ANOTHER :::::::::::::::::::::::::::::::::::: PLAINTIF

VERSUS

CENTENARY BANK (U) LTD :::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

JUDGMENT:

The Plaintiffs, Johnson Baguma & Dorothy Baguma claim against the Defendant, Centenary Bank (U) Ltd for a declaration that the Defendant's sale of the land comprised in LRV 355 Folio 10 Plot 17 Banyu Road Kigonge was wrongful, illegal and irregular. The Plaintiff's also seek to recover the land aforementioned, general damages, interest thereon and costs of the suit.

The background to this suit is that on the 25th October 2006, the Plaintiffs obtained a loan of Ugx. 25,000,000/= from the Defendant bank and mortgaged their land on Plot 17 Banyu Road, Kigongi Kabale Municipality as security. The Plaintiff paid some installments towards repayments of the loan but at some point defaulted. The Defendant's basing themselves on the loan agreement dated 1st November 2006 and the mortgage deed, (Exh D1), instructed Messrs Murambi Auctioneers & High Court bailiffs to recover the money. On receipt of instructions, the court bailiffs issued a written demand on 5th January 2008 to the Plaintiffs and three days later on 8th January 2008, advertised the property in the newspapers. When the Plaintiff learned of this

advertisement, he wrote to the Defendant, a letter dated 15th February 2008 (Exh. D.3) requesting the bank to give him an extra 3 – 4 months within which to pay. The bank declined and wrote to him on 13th March 2008 referring him to the bailiff. The letter in part, read

> *"Upon receiving your letter, it was reviewed in one of our loans committee meetings. The members present resolved that matters be solved with the bank debt collectors, i.e. Messrs Murambi Auctioneers and that you should go ahead and pay the loan balance, otherwise the auctioneers will continue with the process of selling the security to recover the loan. You are therefore advised to pursue all your interests through Murambi Auctioneers".*

The Plaintiffs were unable to settle their indebtedness and the bailiff proceeded to sell the property to one Nyerere Julius at a price of Ugx. 30,300,000/=. The Plaintiff being aggrieved with the whole process filed this suit.

The issues that arose which were agreed upon in a joint scheduling memorandum were two;

1. Whether the Defendant sold the mortgaged property lawfully?

2. What are the remedies available to the parties in the circumstances?

From the Joint Scheduling Memorandum, the Plaintiff and the Defendant were agreed that the Defendants extended Ugx.25,000,000/= to the Plaintiffs and the Plaintiffs put forward their property comprised in LRV 3559 Folio 10 Plot 17 Banyu Road, Kigongi within the Municipality of Kabale as security. Both were also agreed that the property was advertised fro sale in Orumuri newspaper of January 8th – 14th 2008. It was also an agreed position that on 30th January 2008 after the advertisement, the Plaintiffs paid

Ugx. 8,500,000/=. Lastly, the parties were all agreed that the property was sold on 12th June 2008.

The Plaintiff alleged that the property was sold without being advertised and that failure to advertise it did not enable him to clear the debt in time. The Plaintiff's counsel also submitted that the property was not advertised and that failure to do so is what led to the Plaintiffs not paying in time.

With respect, I find it difficult to accept this position because the same Plaintiff in evidence said that it was advertised. He said

> *"Sometime in January, I had not paid the whole amount that I owed the bank of Ugx. 12,600,000/=, they advertised my property"*.

The Orumuri newspaper – Exh. P.3 clearly indicated that Murambi Auctioneers and High Court bailiffs had advertised the property giving the Plaintiff 30 days within which to settle their indebtedness to the Defendant. This court therefore cannot accept the Plaintiff's version that he was not notified.

The Plaintiff also denied in evidence that he ever received demand notices from the bank. DW1 testified that they tried on many occasions to serve the Plaintiff in person but he was avoiding them. That instead he used to send Kamugisha Dennis to the bank to conduct some of his transactions. DW1 further said that it was Dennis Kamugisha who was a guarantor of the loan and a brother to the first Plaintiff, that the Defendant sent to deliver the notices.

The first Plaintiff denied knowing Dennis Kamugisha. DW1, in evidence said that it was actually the Plaintiff who introduced Kamugisha to the bank. The evidence of DW1 is buttressed by the fact that Dennis Kamugisha is the one who witnessed the Banking Facility Agreement on behalf of the Plaintiffs as Exhibit P.1 shows.

Furthermore in a letter, Exhibit D.6, the Plaintiff asked to be allowed to take over Dennis Kamugisha's loan.

This is very clear in a letter headed

> *"Request for allowing me to clear Kamugisha's loan balance"*

He wrote;

> *"I hereby request your office to allow me and get the loan balance off Dennis Kamugisha. I am his guarantor/brother. Kindly assist me Sir. I promise to clear by 5th February 2009"*.

And in yet another letter dated 29th May 2009, the Plaintiff wrote to the manager Centenary Rural Development Bank, Kabale a letter headed

> "Request to stop interest accrued on Kamugisha Dennis loan (7020016910)".

The reason for the request was because he was a beneficiary of the loan to Kamugisha. He wrote;

> *"I hereby request your office to stop charging the above customer (accrued interest) on his loan balance. As a beneficiary of the above loan and having experienced major human problem, I was unable to clear in time. They have been charging Ngabirano Edson also, a guarantor though I am clearing him slowly by slowly but the interest charged is too high to meet so as a parent assist me and stop this accrued interest on this loan and I promise to clear everything soon (loan balance)"*

Exhibit D.5 was a loan agreement in which the Defendant lent Dennis Kamugisha Ugx. 2,000,000/=. The second page does not only show that the Plaintiff guaranteed that loan but also shows that he signed it in the place reserved for borrowers.

With all this evidence on record, which remained undislodged, it is not believable that the Plaintiff did not know Kamugisha. He denied knowing him yet he was ready to take over his debt. He denied knowing him yet he guaranteed his loan. He denied knowing him yet as he wrote in his letter of 29th May 2009, he benefited from Kamugisha's borrowing and he denied knowing him yet he referred to him as his brother in Exhibit D.6. All these only indicate that he knew him and knew him well.

In my view, he denied him because he wanted to deny receiving the notifications from the bank about his debt and the impending sale of his property. He used Kamugisha to avoid the bank. It can only be construed that Kamugisha passed on the bank communications to him. One can therefore say that the Plaintiff was on notice the entire time. The first notice on court record was written on 8th October 2007 headed *"Demand to pay loan installment arrears"*.

The last paragraph of that notice warned the Plaintiff of the consequences in these words

> *"The letter serves to demand from you the amount already in arrears, interest and penalty accumulated to Ugx. 3,751,716/= as of today 8th October 2007.*
>
> *These amounts increase as days go by. I am therefore informing you that the bank is giving you five days from*
>
> *today to clear the outstanding balance or else the bank will continue with other recovery measures".*

In another letter dated 13th November 2007 Exhibit D.4, the Defendant wrote to the Plaintiff reminding him of his failure to honour his loan installments for the months of September, October, November and December 2007 amounting to Ugx. 6,569,663/=, in interest and penalty bringing the total amount due to Ugx. 15,118,155/=. The bank proceeded to recall the debt and wrote:

> *"In the circumstances, we now demand full settlement of the entire outstanding amount of Ugx. 15,118,155/= plus all accruing interest and penalties up to the date of full settlement within 2 weeks from the date of this letter i.e. by 27th November 2007 failure of which we shall take legal action against you and to your cost and peril".*

It seems that the bank having received no response handed the matter was to Murambi Auctioneers and Court bailiffs.

DW3, Muhanguzi of Murambi Auctioneers, on the 5th January 2008 also wrote a demand notice, Exhibit D.10 demanding for loan settlement of *"outstanding balance, costs and fees within 3 days of date of service of notice".*

On 8th January 2008, DW3 advertised the property in the press. The Plaintiff must have seen the advertisement because on the 15th February 2008 he wrote to the Defendant's managers seeking an extension of time within which to pay. In this letter, which amounted to an acknowledgement of the debt he wrote

> *"This is to request you kindly allow us and give us some more time to enable us clear the remaining loan balance of 3 months".*

He explained the cause of delay and requested

"I again Sir request you kindly to halt the sale of my mortgaged property."
(Exhibit D.3)

While the Plaintiff claimed that the letters sent through Kamugisha did not reach him, a claim I dismissed based on his unsupportable denial of Kamugisha Dennis, there is all the evidence that he was notified of the impending sale to which he replied in Exhibit D.3. Furthermore, DW3's evidence that he served the notice, Exhibit D.10 of 5th January 2008 upon the Plaintiff personally remained undisturbed by cross-examination.

Lastly, the Plaintiff himself participated in the process of sale. In his evidence DW3 stated that he received 4 offers from the following;

1. Kamugisha 20,000,000/=
2. Sakira 25,000,000/=
3. Nuwagaba 28,000,000/=
4. Nyerere 30,300,000/=

DW3 told court that Nyerere was taken to his office by the Plaintiff himself. Further that he (DW3) did not even discuss the price because it had already been agreed between Nyerere and the Plaintiff. This evidence remained undisturbed on the record because counsel of the Plaintiff did not dislodge it during cross-examination. It can only be taken to be the truth. In my view, since the Plaintiff participated in the sale and even in the amount to be paid, he cannot turn around and claim that he was not notified of the intention of the bank.

The Plaintiff also alleged that his property was undersold but as I have said earlier, the Plaintiff himself participated in the sale, brought forth a buyer to pay Ugx. 30,300,000/= already agreed between him and the intending buyer. He cannot turn round and claim that his property was undersold. He brought Nyerere, offering the sum

he did because he was convinced that that was the going price of the property at that time.

The evidence of PW1 notwithstanding that the market value was higher where the Plaintiff himself introduced a buyer with a pre agreed amount, one cannot fault the Defendant for the sum that was paid for the building.

Counsel for the Plaintiff also faulted the sale on the ground that Section 10 of the Mortgage Act was not complied with and secondly because the sale had been by private treaty. He must have been referring to the old Mortgage Act which provided for remedies to a mortgagor instead of Section 10 of the new Act which deals with tacking. Suffice it to say, that Section 10 of the old Act provided for sales in the event of foreclosure. The Section provided

> *"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 encumbrancers subsequent to the mortgage, if any consent to a sale by private treaty".*

That provision means that a sale could still be done by private treaty if it is what the parties had agreed.
Suffice it to say that the remedies of the mortgagee in the new Mortgage Act No. 8 of 2009 do not prevent the Defendant from selling by private treaty. Section 28 provides for powers incidental to the power of sale in a mortgage Section 28(1) (d) provides for a sale by private treaty if agreed upon.

The Mortgage Deed, Exhibit D1 was what governed the relationship of the Plaintiff and the Defendant in this transaction. Clause 6 provided for the method of recovery in the event of default. It provided as follows

> *"It is hereby agreed that if any of the monies for the time being owing to the bank are not forthwith paid on demand or having otherwise become payable without demand and the statutory powers of sale conferred on the bank by the Registration of Titles Act, and the Mortgage Decree 1974 including powers to sale by private treaty without reference to court shall immediately become exercisable".*

By the foregoing clause, the Defendant could proceed by public auction or private treaty, which ever he chose. In this instant case private treaty was a provision of the agreement and the Plaintiff should not have complained as he participated in sourcing buyers. His conduct implied consent to the private treaty.

The Plaintiff also contended that after the sale, accountability of the money was not given to him. I have already said that the Plaintiff was well aware of the sale and how much was got from that sale.

On the 11th June 2012, the Plaintiff who was a judgment debtor as a result of 7 Civil Suits wrote to the Chief Magistrate Kabale authorizing the Chief Magistrates Court to receive from Centenary Bank, Kabale Branch the balance of the proceeds from which his mortgaged property was sold by the bank (Exhibit D.9). This was even before the sale of the property. He wrote,

> *"As regards to the above subject, I hereby request your Honourable Court to accept the proceedings of the bank after the sale of my only and only property I had remained with".*

On the 12th June 2012 after the property had been sold, the Defendant on request by the Chief Magistrate after deducting the bank loan of Ugx. 8,392,718/= and the auctioneers cost of Ugx. 780,000/= remitted to the court Ugx.21,127,282/= to be divided amongst the creditors of the Plaintiff. The Defendant also forwarded a copy of the sale agreement, Exhibit P.4. Both the Plaintiffs and the Bailiffs were copied in. In a letter

dated 13th November 2012, forming part of Exhibit D9, the Chief Magistrate wrote to the Defendant confirming receipt of Ugx. 21,127,282/=.

From the foregoing, the sum of money from the sale was well stated, the sum of money that the bank retained was well stated and the sum of money remitted to the court on instruction of the Plaintiff was well stated.

In my view, I find that the Defendants truly and properly described the money obtained from the sale and the manner in which it was dispersed. The accountability was satisfactory.

Having considered the evidence as a whole and for the reasons I have given above, it is my finding that sufficient notice was given to the Plaintiff, the property was lawfully sold at a sum agreed upon by the Plaintiff himself and therefore not undersold and also that the accountability after sale was satisfactorily made.

In the premises, I find the Plaintiff's claims misplaced, with no support of evidence and this suit is dismissed with costs to the Defendant.

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David K. Wangutusi

JUDGE

Date: 27 - 05 - 2014