

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

CS (OS) 11 OF 2014

**IN THE MATTER OF PRIVATE MAILO BUGERERE BLOCK 79 PLOT 31 LAND AT
NAMATONGONYA**

AND

**IN THE MATTER OF A MORTGAGE OVER THE SAID PROPERTY IN FAVOUR OF
ECUMENICAL CHURCH LOAN FUND**

AND

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

BETWEEN

ECUMENICAL CHURCH LOAN FUND UGANDA LTD}.....PLAINTIFF/MORTGAGEE

VS

WAYS KM UGANDA LTD}.....DEFENDANT/MORTGAGOR

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff filed this suit by way of originating summons under the provisions of order 37 rules 4 and 8 of the Civil Procedure Rules for determination of the following questions namely:

1. Whether or not the mortgage should be foreclosed?
2. Whether or not the Mortgagee is entitled to costs?

The originating summons was issued on the 29th of September 2014 and the suit schedule for hearing on 25 November 2014. On 25 November 2014 the Plaintiff appeared through Counsel Rwabugaire Dan but the Defendant was not in court when the Counsel informed the court that service was made on the Defendant but the affidavit of service was not on record. He sought a short adjournment to furnish court with a proper affidavit of service. Though he contended that there was a defective affidavit on record, I did not find the alleged defective affidavit of service on the court record. The hearing of the suit was rescheduled to the 15 December 2014 and the Plaintiff's Counsel was directed to extract a hearing notice and serve the Defendant. Secondly the court directed that there should be a return of service of the summons as well as of the new hearing notice.

A hearing notice was extracted on 2 December 2014 giving notice of hearing on 15 December 2013 at 11.30 in the morning. On 15 December the Defendant did not appear and Counsel for the Plaintiff informed the court that they had been served according to the affidavit of service of one Ronald Mugumya a process server of the High Court. On the basis of the said affidavit of service, the matter proceeded ex parte as enabled by Order 9 rule 20 of the Civil Procedure Rules.

I have carefully considered the evidence of service of the summons as well as hearing notice. The first affidavit of service was filed on 14 November 2014 and is sworn to by the same Ronald Mugumya. He deposes that on 1 October 2014 he received the originating summons from the Plaintiff's lawyers for purposes of service on the Defendant. On the same day 1 October 2013 at 10.00 am he proceeded to the Defendant's offices at Rubaga Kikandwa whereupon he found a receptionist and introduced himself and the purpose of his visit. The receptionist did not disclose her names and forwarded the documents to the office of the accountant whom she said was the right person to receive summons. The accountant introduced herself as Nabagesera Solomy and promised to inquire from her superiors and they would respond to the originating summons. The process server claims to have left a copy of the originating summons but his copy was returned without acknowledgement.

The second affidavit of service is of the hearing notice which was extracted on 2 December 2014 for the hearing of 15 December 2014. He deposes that on 3 December 2014 he received the hearing notices from the Plaintiff's lawyers for service on the Defendant Company and he proceeded to the head offices as aforesaid whereupon he found the receptionist and introduced himself and tendered two copies of the hearing notices with a request for it to be endorsed. The receptionist declined to disclose her names and took the documents to the manager's office. The manager perused the documents but declined to endorse on a copy of the hearing notice.

The originating summons is supported by the affidavits of Akello Immaculate an employee of the Plaintiff Company and the Operations and Business Development Manager. She attaches a copy of the loan agreement annexure "A" dated 19th of May 2011. The agreement is between ECLOF - Uganda Limited and the Defendant. Under the agreement the Defendant borrowed Uganda shillings 40,000,000/= from the Plaintiff for a period of two years. The loan agreement does not have the physical address of the Defendant.

The second document annexure "B" is a board members guarantee in which the board members of the defendant Margaret Mbazira (Chairman), Andrew Wasswa (Secretary), Nakato Olivia (Treasurer) and Nakanya Marion K (member) executed a guarantee agreement with the plaintiff undertaking to be liable personally for the loan in case of default of the Defendant Company.

The third document is a power of attorney dated 26th of May 2011 in which the Defendant was empowered by one Andrew Wasswa Kibowa and Olivia Nakato registered proprietors of the suit property comprised in registered mailo title Block 79 plot 31 East Buganda district to mortgage their property or pledge it as security for a loan facility with the Plaintiff.

The fourth document annexure "D" is a certificate of title and shows that the two donors of the powers of attorney are the registered proprietors of the suit property. The annexure does not show whether a mortgage had been registered on the suit property because the encumbrance page is missing. Finally the

deponent attaches the legal mortgage document between the Defendant as the Mortgagor and the Plaintiff as the Mortgagee mortgaging plot 31 Block 79 land at Namatagonya Bugerere County, Ssabagabo sub County. The document seems to be registered with the registrar of titles but the encumbrance page of the certificate of title is missing. Secondly the physical address of the Defendant is not disclosed. The Defendant's address is described as of PO Box 30454 Kampala, Uganda.

I have further considered the affidavit in support of the originating summons which deposes that on the 24th of May 2011 the Defendant obtained a loan of Uganda shillings 40,000,000/= according to the loan agreement. Secondly it is deposed that the total outstanding loan is Uganda shillings 65,200,000/=. Thirdly that the Mortgagor was served with a demand note and default notes and failed/neglected to clear the outstanding loan according to copies of the demand notices attached.

I have duly considered the demand notices. The first one is entitled loan default and is dated 14th of November 2011 in which it is written that the Defendant defaulted on a loan instalment of Uganda shillings 4,600,000/= for the months of November and December 2011. The Defendant was required to clear the arrears by 16th of December 2011. The second letter is dated 24th of January 2012 entitled "Calling Back the Entire Loan and Accrued Interest." It is written therein that there was a default in payment for the months of November, December 2011 and January 2012 and the total outstanding sum was Uganda shillings 6,900,000/=. Finally the Plaintiff attached a letter dated 11th January 2012 addressed to the director of the Defendant entitled "Last Reminder on Loan Default". The Defendant was required to clear the outstanding loan balance of Uganda shillings 6,900,000/= together with a fee of Uganda shillings 207,000/= plus another Uganda shillings 69,000/= by 13 January 2012.

I have duly considered the provisions of the Mortgage Act, Act 8 of 2009 as well as Order 37 rule 4 of the Civil Procedure Rules.

Order 37 rule 4 of the Civil Procedure Rules provides that:

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"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."

Foreclosure is a special procedure available to a Mortgagee seeking an order to foreclose the right of a mortgagor to redeem the mortgaged property and to exercise power of sale of mortgaged property by order of court. Sale by order of court is however wider and need not be part of a foreclosure application or procedure.

Foreclosure is envisaged by Order 37 rule 4 of the Civil Procedure Rules. The above rule can only implement the substantive law on mortgages and has to be read in conjunction with such law i.e. the Mortgage Act, Act 8 of 2009. The Mortgagee seeks the remedy of foreclosure of the right of the Mortgagor to redeem the suit property as envisaged in Order 37 rule 4 of the Civil Procedure Rules. Where there is an application for foreclosure and before the prayer for foreclosure can be considered, the Mortgagee must satisfy the court that he/she/it has complied with the statutory requirements of the Mortgage Act, 2009, which give the substantive law on mortgages in order to act in conformity with the intention of legislature in the enactment of the recently enacted Mortgage Act 2009 and repeal of the earlier law.

Section 19 (1) of the Mortgage Act provides 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. For emphasis the *notice shall be in the prescribed form under section 19 (3) of the Mortgage Act.*

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. I must note that the exercise of the power of sale by a Mortgagee under the Mortgage Act sections 19, 20 and 26 is not preceded by an order of the court but is a statutory power of sale based on compliance with the prescribed procedure. The prescribe procedure has inbuilt statutory safeguards that ensures sufficient notice to interested parties and fairness.

Notwithstanding the right of exercise of statutory powers of sale of a mortgagee who has complied with the procedure for sale, in this suit no evidence of a demand notice giving the Mortgagee 45 days as prescribed by Section 19 (3) of the Mortgage Act in the prescribed form and requiring the Mortgagor to rectify default has been adduced. The remedy of sale of the mortgaged property under section 20 (e) of the Mortgage Act gives the Mortgagee powers of sale as a remedy and also makes provision for the Mortgagee's power of sale under section 26 of the Mortgage Act. The remedy cannot be exercised through court order 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.

Before sale by a Mortgagee notice has to be given under section 26 (2) of the intention to sell by a Mortgagee. Most importantly a copy of the notice to sell is given to the Mortgagor, any spouse of the Mortgagor, the surety, etc under section 26 (3). When the Mortgagee without coming to court does this, the interested persons such as the sureties, donee of powers of attorney or spouses may apply to court for relief.

A Mortgagee is under obligation to the court to prove entitlement under the Mortgage Act by proving that it has complied with the statutory provisions provided for under section 19 and 26 of the Mortgage Act. The remedy of foreclosure cannot be granted where a suit has been commenced by originating summons in the absence of clear evidence of compliance with the statutory provisions which now governs all mortgages. In any case the Mortgagee need not come to court. The law envisages other persons coming to court to seek relief from the exercise of the statutory power of sale by a Mortgagee. The right of interested persons other than the Mortgagee to seek relief from court can be found under sections 33, 34, 35 and 36 of the Mortgage Act 2009.

Foreclosure procedure on the other hand is a procedure to sell the mortgaged land by an order of the court foreclosing the right of a mortgagor to redeem the property and having the property vest in the mortgagee as an absolute owner thereof before the sale. In the procedure, notice and opportunity is given to the Mortgagor to exercise the right or equity of redemption before the option to redeem is extinguished. According to Oxford Dictionary of Law 5th Edition, foreclosure is:

“A remedy available to a mortgagee when the mortgagor has failed to payoff a mortgage by the contractual date for redemption. The mortgagee is entitled to bring an action in the High Court, seeking an order fixing a date to pay off the debt; if the mortgagor does not pay by that date he will be foreclosed, i.e. he will lose the mortgaged property. If, after this order (a foreclosure order nisi) is made, the mortgagor does not pay on the date and at the place named, the foreclosure is made absolute and the property thereafter belongs to the mortgagee. However, the court has discretion to allow the mortgagor to reopen the foreclosure and thereby regain his property.”

The remedy and procedure for the relief of foreclosure is provided for under the repealed Mortgage Act cap 229 under section 2 thereof allowing the Mortgagee upon default of the Mortgagor to sue the Mortgagor on the covenant. Under the repealed Mortgage Act cap 229 section 3 (c) thereof, the Mortgagee may realize

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his or her security by foreclosure among other prescribed remedies. Sale by foreclosure is expressly provided for under section 8 and 9 of the repealed Mortgage Act cap 229. Section 8 of the repealed law is pertinent and provided as follows:

“8. Foreclosure

(1) A mortgagee may apply to the court to foreclose the right of the mortgagor to redeem the mortgaged land anytime after the breach of covenant to pay.

(2) Upon an application by the mortgagee under this section, the court shall determine the amount due to the mortgagee and may fix a date, not exceeding six months from the date of the failure to pay, within which the mortgagor shall pay the amount due.

(3) If the mortgagor fails to pay on the date fixed by the court under subsection (2), 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 in accordance with section 9.”

This procedure has been repealed by section 44 of the Mortgage Act 2009, Act 9 of 2009 which section repeals the Mortgage Act cap 229. The result of the repeal is that with the statutory safeguards in place, a statutory power of sale may be exercised by a Mortgagee who need not come to court. It is the other parties who are entitled to notice who usually come to court. There is no foreclosure procedure under the Mortgage Act 2009. Though the court has power to order sale of mortgaged property, the use of the term foreclosure presupposes use of the procedure under section 8 of the repealed Mortgage Act cap 229 which term can be misleading. Furthermore the circumstance under which the court may order sale of mortgaged property in other proceedings need to be further explored but that exploration is not necessary in these proceedings. Suffice it to note that the power of the court to order sale of mortgaged property can arise in other proceedings which may not necessarily be between a Mortgagee and a Mortgagor. I.e. in a winding up of a company or bankruptcy proceedings,

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mortgaged property can be ordered to be sold subject of course to priority ranking stipulated in the law for secured creditors.

Where the court uses its powers to order sale of mortgaged property in proceedings between a Mortgagee and Mortgagor, the court has to ensure that the Mortgagee has complied with the provisions of section 19, 20 and 26 of the Mortgage Act 2009. Last but not least the current statutory provisions have sufficient safeguards in the exercise of a statutory power of sale by a Mortgagee without prior intervention of court to protect interested persons. A sale by a Mortgagee for example shall be by Public Auction unless sale by private treaty is agreed to by the Mortgagor while a sale by order of court may be conducted in the manner directed by the court in according to regulations 8 and 9 of the Mortgage Regulations 2012 respectively.

Order 37 rule 11 of the Civil Procedure Rules provides that:

“The judge hearing an originating summons may, if he or she thinks fit, adjourn the hearing into court for taking evidence viva voce or hearing arguments; and, if it appears to him or her that the matters in respect of which relief is sought cannot properly be disposed of in a summary manner, may refuse to pass any order on the summons, and may dismiss it, referring the parties to a suit in the ordinary course, making such orders as to costs as may appear to be just.”

The rule gives the court powers on hearing the originating summons to adjourn the hearing into court for taking evidence viva voce or to dismiss the suit referring the parties to a suit in the ordinary course.

I have duly considered the unsatisfactory state of affairs in terms of the service of the Defendant where there is no evidence of acknowledgement, there is no physical address mentioned in the supporting documents, there is no compliance with section 19 of the Mortgage Act whose provisions are mandatory with regard to the prayer for foreclosure of the right of the Mortgagor to redeem the suit property.

In the premises this is not an appropriate suit for determination in a summary manner and I accordingly dismiss the originating summons and the Plaintiff shall, if it wants an order of the court to sell the mortgaged property, file an ordinary suit.

Because this suit proceeded ex parte, there shall be no order as to costs. In the absence of the plaintiff when judgment was being delivered, the court shall serve this judgment on the plaintiff.

Judgment delivered in open court the 12th of January 2015

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

None of the parties present

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

12th January 2015