

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 161 OF 2018

(ARISING FROM HCCS NO. 662 OF 2016)

STANDARD CHARTERED BANK UGANDA LIMITED:.....APPLICANT

VERSUS

HABIB OIL LIMITED

HABIB PROPERTIES LIMITED

HABIB BROTHERS LIMITED

BLACK EAGLE INVESTMENTS LIMITED

HABIB KAGIMU:.....RESPONDENTS

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

Standard Chartered Bank Uganda Limited the Applicant in these proceedings filed this Application against Habib Oil Limited, Habib Properties Limited, Habib Brothers Limited, Black Eagle Investments Limited and Habib Kagimu herein referred to as the Respondents seeking court orders that the Applicant be granted vacant possession of properties comprised in Plots 114-116 Bunyonyi Drive, Kiswa, Plot 18 Wampewo Avenue and Plot 1094 Sir Apollo Kaggwa Road.

This Application is premised on the following;

- a) That the 1st Respondent was granted a loan facility by the Applicant. The facility was secured by various properties including the suit properties that were mortgaged in the Applicant's favour.

- b) That the 1st Respondent defaulted on her loan obligations. In response the Applicant issued a notice of default dated 13th April 2016 against the Respondents.
- c) The Respondents failed to repay the outstanding sums and on 25th August 2016 the Applicant issued a notice of sale of the mortgaged properties.
- d) That the Respondents have frustrated the Applicant's recovery of the monies due and owing.

The background of this Application as discerned from the pleadings is that the 1st Respondent entered into a fuel supply agreement with M/S Electromaxx (U) Limited referred to Electromaxx in these proceedings. This agreement stated that the 1st Respondent would use Electromaxx 's thermal power plant to supply power to the national grid under a power purchase agreement with Uganda Electricity Transmission Company Limited. As a result of these transactions the 1st Respondent obtained financing from the Applicant to enable her carry out the importation of fuel for supply as agreed in the fuel supply agreement.

The Applicant granted the 1st Respondent import loan facilities which included; short term loans, import invoice financing facilities, overdrafts and bonds all in the aggregate amount of US \$ 9,000,000.

The 1st Respondent was obligated to submit the said fuel supply agreements executed with Electromaxx to the Defendant together with the payment guarantee from Electromaxx and assign it to the Defendant. The 1st Respondent also issued a bank guarantee worth US \$ 2,000,000, personal guarantees of US \$ 9,100,000, created a debenture over her fixed and floating assets as well as legal mortgages.

Repayment of the facilities was to be sourced from payments from Electromaxx however the 1st Respondent experienced delayed payments caused by delayed payments made to Electromaxx from Uganda Electricity Transmission Company limited. Despite notifying the Applicant of these delays she kept issuing demands for repayment, notice of default and recall of the loan to the 5th Respondent and a notice of sale of the Respondents' mortgaged properties. The Respondents therefore filed Civil Suit No. 662 of 2016 as Plaintiffs against the Applicant/Defendant seeking declarations that;

- a) The Banking transactions contract between the Plaintiff/Respondent and the Defendant is frustrated
- b) The Defendant/Applicant's recall of the 1st Plaintiff's/1st Respondent's loan is irregular, premature and illegal
- c) The Defendant/Applicant's notice of sale of the Plaintiffs' mortgaged properties is irregular and illegal.
- d) The loan amounts demanded by the Defendant/Applicant are inflated and not due.
- e) The interest charged by the Defendant/Applicant under the loan is excessive, speculative and uncertain, making it void and unenforceable

The Respondents/Plaintiffs also sought court orders to take account and reconciliation of the 1st Respondent's loan account to determine the correct loan amount due to the Applicant, a permanent injunction restraining the Defendant/Applicant its agents or servants from selling the Plaintiffs'/Respondents' mortgaged properties, a permanent injunction restraining the Defendant/Applicant, its agent and servants from taking any loan recovery measures against the Plaintiffs/Respondents, general damages, exemplary damages and costs.

Contesting the loan demand of US \$ 2,539,476 by the Defendant the Respondents/Plaintiffs then filed Misc. Application No. 143 of 2018 as Applicants against the Defendant bank as Respondent seeking;

- a) An order for the taking of an account/audit/reconciliation of the 1st Respondent's/Plaintiff's loan account to ascertain the amount owed to the Applicant/Defendant bank.
- b) An order stopping the Applicant/Defendant bank from recovering monies claimed and/or alleged to owe from the 1st Respondent pending commencement and conclusion of the account audit and reconciliation.

On 7th March 2018 when Misc. Application No. 143 of 2018 was called for hearing Counsel for the Respondents in these proceedings submitted that his client owed US \$ 1,500,000.

Court then gave orders granting the injunction and stay of execution restraining the bank from exercising its right to recover the money owed under the mortgage, subject to the Applicants' payment of USD 1,000,000 to the bank within three weeks from 7th March 2018. The injunction

and stay of execution were to remain in force till the expiration of the three weeks from 7th March 2018.

The Respondents failed to pay the USD 1,000,000 as ordered by court therefore the Applicant filed this Application seeking vacant possession.

It is the Applicant's contention that once the Respondents failed to pay the USD 1,000,000 the injunction and stay of execution would immediately lapse and she would be justified to seek vacant possession of the suit properties.

The Respondent in her reply deponed by Haji Habib Kagimu a director of the 1st Respondent Company contended that as a result of the current economic hardship in the Respondent's business it became impossible for the Respondent to raise the money ordered by court within a period of three weeks. Furthermore, that because of the inability to repay the amount owed they requested the Applicant bank to avail them with the loan statement for an audit and reconciliation to enable them seek alternative financing.

When the matter was called for hearing on 9th May 2018 counsel for the Respondents conceded that payment of the USD 1,000,000 as ordered by court had not been made. He also submitted that parties were pursuing a settlement. Surprisingly this time it was the Respondents' contention that they had not yet come up with the figure they owe since the accountant was still auditing the sums owed.

The mortgage executed by the parties on 22nd July 2010 authorised the Applicant to sale the security in event of breach. Clause 5(a) (iv) stated that;

“That the mortgage debt and commission and charges hereby secured shall immediately become payable without demand and the statutory power of sale of the Bank shall forthwith become exercisable without any further or other notice;

(iv) if the Surety or Borrower shall commit a breach of any of the covenants and agreements for the payment of the mortgage debt of the commission and charges thereon) on the part of the Surety of the Borrower herein implied.”

A supplementary mortgage deed executed between the Applicant and the 1st Respondent on 24th February 2011 also authorised the Applicant to sell the mortgaged properties in event that the Respondent defaulted in payment.

Therefore, the Applicant was acting within her rights as provided under the mortgage agreement. On 13th April 2015 a notice of default was written to the 4th Respondent through the 1st Respondent by the Applicant's advocates Kampala Associated Advocates. The notice read in part;

“The Company has since defaulted on its monthly repayment obligations in spite of repeated reminders, demands, notices; it has failed/refused/neglected to regularize its account, with the result that arrears have continued to accrue.

This is to notify you that the Facility has now been recalled and we have instructions to demand, as we hereby do, the repayment of the total monies outstanding, together with legal fees.

TAKE FURTHER NOTICE that in accordance with the mortgage, you are required to pay the sum USD 2,539,476 within 45 days from the date of this notice in order to rectify the default.

The Debenture is now enforceable.”

Notice of Enforcement of Guarantee and Demand for payment of USD 2,539,476 owing to the Applicant by the 1st Respondent was also given to the 5th Respondent on the same day.

The Respondent was unable to make good this demand. In a letter dated 28th July 2016, the 1st Respondent pegged the delay in repayment of the outstanding sum on the buyers of the properties and Electromaxx who had not received payment from Government.

It is my view that the actions of the 1st Respondent are the actions of a defaulting customer struggling to repay her debts. Upon default of the borrower the mortgagee is entitled to commence foreclosure proceedings; **Global Trust Bank vs Frank Mugisha HCCS No. 5 of 2012.**

That the Respondents owe money is not in doubt. Counsel for the Respondents clearly admitted that his client was indebted to a tune of 1,500,000 USD. This money has not been paid.

Court then directed that they deposit USD 1,000,000 within three weeks. The order was given on 7th March 2018. To date over two months later the sum has not been deposited.

Clause 5(a) (iv) clearly provides what happens in event of nonpayment in these words;

“That the mortgage debt and commission and charge hereby secured shall immediately become payable without demand and the statutory power of sale by the Bank shall forthwith become exercisable without any further notice.”

Although the clause empowered the Applicant to act in recovery without notice, the Applicant in this case actually gave notice to the Respondents.

The sale was intended to enable the bank recover what would be ascertained.

In this particular case, the Respondents admit a debt of 1,500,000 USD which triggers the clause into action.

That being the case, the denial of access to the mortgaged property by the Respondents is in breach of agreed terms. Since Plots 114-116 Bunyonyi Drive Kiswa, Plot 18 Wampewo Avenue and Plot 1094 Sir Apollo Kagga Road were approved as securities and indeed taken as such, the Applicants are entitled to access them and it is hereby ordered that the Respondents give to the Applicant vacant possession.

It is so ordered with costs in favour of the Applicant.

Dated at Kampala this 30th day of May 2018

HON. JUSTICE DAVID K. WANGUTUSI
JUDGE