

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

**MISC. APPLICATION NO. 269 OF 2016
(ARISING OUT OF CIVIL SUIT NO. 239 OF 2016)**

MUGOBI TRADERS LTD:.....APPLICANT

VERSUS

STANDARD CHARTERED BANK LTD:.....RESPONDENT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

This is an application brought by Mugobi Traders Limited, the Applicant hereinafter, against Standard Chartered Bank Limited to be referred to as the Respondent.

The Applicant seeks a temporary injunction to restrain the Respondent from advertising, selling, foreclosing, impounding or in anyway dealing with the Applicant's land and properties until the disposal of the suit.

The Applicant also seeks a Temporary Order to honour and maintain the terms of the Guarantee by Bank facility and the Banking facility letter dated 20th October 2014 and Adendum thereto.

The Application is grounded on the following, that the Applicant has filed a Civil Suit against the Respondent which has a prima facie case with an overwhelming chance of success.

The Applicant's loan facility is not a Non Performing Facility and any intended debt. Recovery proceedings by the Respondent against the Applicant are illegal and a breach of the Financial Institutions (Credit Classification and Provisioning) Regulation 2005. Further that the Respondent's Credit procedures and methods used against the Applicant are in breach of the Bank of Uganda Financial Consumer Protection Guidelines. That the Loan Documentation including the Term Loan Letter and the mortgage deed are unenforceable

against the Applicant in as far as they are not executed under seal of Respondent, the signatures are not witnessed and are not signed by the Respondent's authorized signatories. The acts of recalling the Applicant's facilities and advertising the Applicant's properties are contrary to the Mortgage Act 2009.

That it was therefore fair and equitable that the application is granted.

Further that the Demand Letter/Recall Notice is a breach of the Mortgage Act as it provided no time for the Applicant to rectify the default and it does not comply with the requirements of notice under the Mortgage Act.

In reply the Respondent contended that it acted within the confines of the Mortgage Act by giving the Applicant the requisite notice.

The background to this application can be discerned from the Applicant's plaint.

On the 20th October 2014 and again on the 30th October 2014 the Applicant borrowed UGX 3,070,489,000/= from the Respondent. The loan was to be paid back in 60 months at monthly installment of UGX 77,137,481 at an interest of 17.5%.

The Applicant was also subsequently granted another facility in form of Guarantee by the Respondent to facilitate issuance of bid bonds and guarantees upto UGX 200,000,000/=.

The Applicant however defaulted accumulating arrears of UGX 359,891,389/=.

The Applicant failed to pay so the Respondent issued a Demand notice.

That a loan of the amount earlier mentioned was granted is not in issue. It is also not in dispute that the Applicant is in arrears.

What is in issue however is;

- (1) Whether there was a mortgage in place.
- (2) Whether the Respondent acted within the Mortgage Act when she recalled the mortgage.
- (3) Whether the Respondent acted within the provisions of the Bank of Uganda Financial Consumer Protection Guidelines 2011.

One of the contentions of the Applicant is that the Respondent acted outside the obligations of the Financial Service Provider laid down in the Bank of Uganda Financial Consumer Protection Guidelines 2011.

The key principles governing the relationship between the Respondent and the Applicant were; fairness, reliability and transparency found in paragraph 5 of the Bank of Uganda Financial Consumer Protection Guidelines 2011.

Fairness in this case demands that the Respondent was expected to act fairly and reasonably in all its dealings with the Applicant. He was not expected to engage in unfair, deceptive or aggressive practices such as threatening, intimidating, violence towards, abusive or humiliating the Applicant. Lastly, for fairness to exist the Respondent was not supposed to offer, accept or ask for bribes or other gifts or unfairly induce the other.

Discrimination by the Respondent against the Applicant on grounds of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social standing, political opinion or disability including taking advantage of the Applicant's incapability or understanding the character or nature of the transaction that took place were matters that fell under the head of fairness.

Furthermore the inclusion of an unconscionable term in the agreement or the exertion of undue influence or duress on the Applicant to enter into the transaction that took place between them, the disguise, diminishing or concealing of a material fact by use of print so small in size to be exact less than ten font as to make the instructions difficult to read thus misleading the consumer are matters that should be considered under the head of unfairness.

From the evidence provided there is nothing to show that there was unfairness, deception or threatening, intimidating, violent, abusive or humiliating conduct of the Respondent against the Applicant.

There is no evidence of offering or asking for bribes.

On the contrary the Applicant who had taken a loan and had the obligation to pay a call monthly installment of UGX 77,137,481/= inclusive of interest which was to be debited from her current account on the 30th day of every month defaulted for several months and although the Respondent had the provisions of the facility letter in her favour to immediately demand

for payment when that event of default occurred she did not immediately demand for full payment.

Clause 10 of the facility letter lists events of default in 10.1 as non- payment. It provides;

“That it shall be an event of default if the borrower fails to pay on the date indicated in any written demand from the bank any amount indicated pursuant to the loan documents.”

It provides for a period to remedy the default under 10.3 in these words;

“No event of default under this paragraph will occur if the failure to comply is capable of remedy and is remedied within 21 working days of the bank giving written notice to the borrower and the mortgagor or the giving becoming aware of the failure to comply.”

I would like to mention here that from the various correspondences the Borrower was well aware of the failure to comply.

Clause 11.1 of the facility letter provides for the enforcement of security. That it shall become immediately enforceable if an event of default has occurred and while such event is continuing the bank notifies the borrower in writing of the occurrence of that event of default or takes any of the steps it is entitled to take by reason of occurrence of such event of default.

It is only after several months of non-payment that the Respondent wrote a demand notice/loan recall on the 25th May 2015 giving the Applicant 45 days within which to pay to avoid the sale of the security.

Even after that demand/recall notice the Respondent on request of the Applicant allowed the Applicant to sell some of the properties. Those sales are clearly shown in Annexure 7 wherein one property was sold to Brian Seremba and Annexure 8 where the purchaser was Prince Daudi S.K. Golooba and Marian Golooba.

This acquiescence by the Respondent can only be viewed as acts of fairness, devoid of harassment or intimidation.

It is therefore in my view that the Respondent has not acted unfairly.

As per reliability there is no suggestion that they were not reliable. The account of the Applicant was not mismanaged and there is no evidence to suggest that the Applicant's self-service banking channels were interfered with nor that the Respondent disclosed anything to do with these accounts outside the law.

As for transparency there is no evidence whatsoever to indicate that there was information given to the Applicant whether in writing, electronically or orally which was unfair, unclear or non-transparent. All evidence shows that at the time the Applicant chose the product and service exhibited in the facility letters they knew what they were going in for because the information given to them was fair, clear and transparent.

Nowhere in the evidence is it shown that the information was incomprehensible or that it was not in plain English or in a font size of less than ten point. It is not alleged anywhere that the Applicant could not understand English or that oral explanations were not given when required.

In my view there was transparency throughout the transaction.

In conclusion, the allegation that the Respondent did not abide by the Bank of Uganda Financial Consumer Protection Guidelines 2011 is devoid of merit.

The Applicant also contends that the Respondent cannot lawfully commence recovery action against them because the credit rehabilitation avenues provided under the Financial Institutions Credit facilitation provision Regulations of 2005 were not complied with.

Furthermore, the Respondent's credit recovery procedures are unfair because they are only bent to selling the Applicant's property.

On the issue of the bank being only interested to sell the property it is this court's finding that the Applicant herself in writing requested to be allowed to sell some of the properties and suggested that on selling they would pay a reduced monthly installment. In fact the bank allowed them to sell two of those properties.

In her request to sell she even proposed a restructured mode of payment. Annexure A6 dated 2nd June 2015 written by the Applicant's Advocate reads in part;

“Our client has received a proposal for purchase of properties comprised in Plot 7930-7935 at Kisugu at UGX 700,000,000/=. Payment to be made in two phases with the first within seven days after execution and the second payment after three weeks thereafter. We propose that these funds be used to regularize our client’s loan position and to reduce the capital amount of the loan. In light of the foregoing, our client requests that you reduce the monthly instalment amount to UGX 40,000,000/=.”

On the 6th of June 2015 the Applicant’s Advocates wrote another letter seeking the reduction of the monthly installments, they wrote;

“We also would like to correct the request for reduction of the monthly instalment.

Our client has advised that he is comfortable with paying UGX 30,000,000/= not UGX 40,000,000/= as stated in our earlier letter.

Please correct this error accordingly.”

On the 10th of August 2015 the Applicant sought the change of mode of payment. That it would only be able to pay UGX 1,000,000 per day.

It wrote;

“In addition, the company will begin paying on the loan facility in monthly installments of UGX 1,000,000/= per day.”

Counsel for the Applicant submitted that they did not proceed to pay the UGX 40,000,000/= every months nor 30,000,000/= subsequently suggested nor 1,000,000/= per day was being paid.

The action of the Applicant not depositing even what it had suggested what itself made the lender believe that there would be no further payment.

The Applicant also contended that before the Respondent could proceed full recovery, it had to comply with Regulation 14(1) and (2).

Regulation 14(1) and (2) provides as follows;

- (1) A Financial Institution shall evaluate the status of security or collateral on any credit facility once payment of principle or interest falls into arrears or becomes irregular.
- (2) A Financial Institution shall initiate procedures to realize any security or collateral once a credit facility becomes non-performing.

Non Performing Credit facilities are provided for under Regulation 6 of the Financial Institutions (Credit Classification and Provisioning Clause) Regulation 2005. It provides:-

“A credit facility with a pre-established repayment schedule shall be considered non-performing if;

- a) The principle/interest is due and unpaid for 90 days or more.*
- b) The principle or interest payments equal to 90 days interest or more have been capitalized, refinanced, renegotiated, restricted or rolled over.”*

It is not in doubt and indeed it was admitted by all that this was a credit facility with a pre-established repayment scheme provided for under the facility letter of 30th October 2015 under repayment in these words;

“To pay equal monthly installments of UGX 77,137,481/= inclusive of interest to be debited from your current account on the 30th day of every month after the loan draw out date without default.”

This was therefore a credit facility with a pre-established payment schedule. That being the case once the principle or interest became due and unpaid for 90 days or more it became a non performing credit facility.

Once it became a non-performing credit facility the Respondent was free to initiate procedures to realize the security. The Applicant having admitted that they failed to pay in accordance with the repayment schedule. For several months empowered the Respondent to proceed under Reg. 14 (2) of the Financial Institution (Credit Classification) Provisioning Regulations 2005 by initiating procedures to realize the security and/or collateral as it did.

The Applicant further contended that beginning with the demand of the full amount was wrong in as much as there had been no demand by the Respondent to rectify what was in arrears.

Having gone through the Annexures I find that the notice to rectify by payment of arrears was indeed given. In the demand notice of 25th May 2015 while asking for the outstanding balance the Respondent's Lawyers wrote in part;

“The Company has since defaulted on its monthly repayment obligations and inspite of repeated reminder, demands and notices it has failed, refused, neglected to regularize its account with the result that arrests have continued to accrue.”

The Applicant wrote several letters thereafter noting the contents of the demand notice nowhere did she dispute that an earlier demand to regularize the client's loan position had been communicated to them.

My view is that the notice had been given and the demand loan/recall notice was issued correctly.

Lastly, it was submitted for the Applicant that the loan documentation including the loan agreement were invalid and unenforceable against the Applicant because they had not been executed under seal of the Respondent. Further that the signatures were not witnesses and names of signatories were not disclosed and not signed by the Respondent's authorized signatories.

In addition that the loan agreement signatures were not for the authorized signatories.

Beginning with this last contention, it is observed that the facility letters were signed, that subsequent to that the Applicant's accounts were credited they were drawn down by no other than the Applicant and they can now not turn around and say the transaction was illegal.

In fact, if it was illegal then that is the more reason why all the sums of money should fall due and be recovered. The arrears that they wanted to regularize were all provided for in this facility letter. A party cannot rely on a document when it suits it and discard it when it doesn't. you cannot reprobate and approbate at the same time.

On whether the names of the signatories witnessing the bank's facility letter were provided for, this court finds that they were in the names of Hellen KayangeMubiru-Luyima as the Manager in-charge Credit Risk Control and Godfrey Ssebana as Head Commercial Banking.

Interestingly, the Directors of the Applicant guaranteed the transaction who included the deponent of the Affidavit in support of this application, MugoyaMawazi and his wife who gave the spousal consent all supported by signing the facility letter for and on behalf of the Applicant, in which they accepted the banking arrangements stated in the offer letter and the terms and conditions therein subject to the covenant set out in the offer letter and general terms and conditions.

In her spousal assent ZamMugoya the Director of the Applicant clearly states that;

“I acknowledge and confirm that I have received independent advice and declare that I irrevocably consent to the mortgaging of the property upon the terms and conditions of the offer letter.”

The intentions of the Directors, and their subsequent conduct makes it clear at all times a mortgage had been created.

Having found that the signatures were also accompanied by the names of the people signing I find no merit in Counsel’s submission that the documents were not witnessed or that the names of the signatories were not mentioned.

I find that the creation of the mortgage was done through the consent of all the parties and with no fraud as would lead this court to impeach it.

It is clear from the proceedings that the Applicant was lent money, defaulted in payment, became non-performing and did not regularize her arrears inspite of several demands which prompted the Respondent to recall the loan.

In conclusion, for the several reasons I have given above it is my finding that the Respondent is entitled to recovery of the customer’s money in the manner agreed upon by the parties.

I therefore find this Application for temporary injunction devoid of merit and it is dismissed with costs.

Dated at Kampala this 20th day of August 2018.

**HON. JUSTICE DAVID WANGUTUSI
JUDGE**