

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

ORIGINATING SUMMONS NO.15 OF 2019

INSIGNIA HOLDINGS LIMITED ::
PLAINTIFF

VERSUS

CISSY KITYO MUTULUZA ::
DEFENDANT

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

JUDGEMENT

The Plaintiff brought this suit against the Defendant by way of Originating Summons for determination of the following questions:-

- 1) Whether the Applicant is entitled to foreclose and sell the mortgaged property of the mortgagor, to recover all the sum of money due in respect of the principal debt, interest and other incidental charges.
- 2) Whether the Applicant is entitled to sell the said mortgaged property by private treaty or public auction to recover the entire sum due to it together with costs and expenses related thereto.
- 3) Whether the Plaintiff/Applicant is entitled to costs of this suit.

The Originating Summons was supported by an affidavit sworn by John Kizito Kaggwa, a grantee of a Power of Attorney from the Plaintiff, which contained the grounds of the application. In the affidavit, the deponent stated that the Defendant is the registered proprietor of land comprised in Busiro Block 274 Plot 214, Land at Mpunga who approached the Plaintiff for advance of a sum of USD 255,728 for purpose of clearing her debts with Stanbic Bank Uganda Limited. The Plaintiff paid the said sum to Stanbic Bank in favour of the Defendant's Company and redeemed the Defendant's property which had been mortgaged to the said Bank. The Defendant

undertook to pay back the said monies together with bank interest within a period of one year from when it was credited on the Defendant's Company bank account. The Defendant secured the repayment by handing over the Original Certificate of Title of the same property and the Release of Mortgage document to the Plaintiff. The Plaintiff went ahead to lodge a caveat on the above mentioned property so as to protect the interests of the Plaintiff. The Defendant did not pay in time as agreed and kept requesting for more time within which to pay, to no avail. The Plaintiff commissioned a valuation of the property in issue and had served the Defendant with a notice of indebtedness.

The Defendant filed an affidavit in reply in which she denied the Plaintiff's claims. The Defendant stated that it was JOMA Investments Co. Ltd that obtained a loan facility from Stanbic Bank using the Defendant's land at Block 274 Plot 212 at Wakiso Mpunga which was mortgaged as security. The Company had problems with its poultry business and was unable to service the loan within time as agreed. The Defendant then reached out to Mr. Sateesh, a Director of the Plaintiff Company, who bailed out JOMA Investments Co. Ltd by paying in instalments a total sum of USD 240,222. Upon full payment, the Defendant's certificate of title was passed from Stanbic Bank to the Plaintiff's lawyers. The Defendant stated that when extending the soft loan facility, the Plaintiff dealt with JOMA Investments Co. Ltd and the Plaintiff therefore has no locus to sue the Defendant in her personal capacity. The Defendant disputed the actual amount claimed by the Plaintiff and further stated that there was no agreement as to payment of bank interest. The Defendant further stated that the Plaintiff was not entitled to foreclose and sell the mortgaged property in order to recover the principal and interest from the Defendant. The Defendant averred that she was advised by her lawyer to the effect that the Plaintiff not being a money lending institution was not entitled to demand interest on the loan it advanced. The Defendant further averred that the Originating Summons does not comply with the law and it ought to be refused and dismissed with costs.

In an affidavit in rejoinder, the Plaintiff's Attorney (John Kizito Kagwa) stated that JOMA Investments Co. Ltd could not have been lent money since there was no board resolution allowing it to borrow. The deponent averred that it is the Defendant who borrowed the money in her personal capacity so as to clear the debts of JOMA Investments in which she is a shareholder and Director, the reason she gave her property and the certificate of title as security and not the Company's property. The Plaintiff's Attorney further stated that the said sum was advanced to the Defendant who has at all material times acknowledged her indebtedness to the Plaintiff promising to pay in the shortest possible time. The deponent attached copies of email correspondences to that effect. The deponent further stated that the Plaintiff was entitled to demand for interest on the principal amount since it was the Defendant that gave the proposal as to interest and it was agreed that interest would be at bank rate. The deponent insisted that the amount claimed by the Plaintiff was the known amount and the Defendant had not shown otherwise. The deponent averred that this was a clear and straight forward case where Originating Summons were applicable to seek foreclosure on the equitable mortgage.

When the matter came up for hearing, the Plaintiff was represented by Mr. Aubrey Lukongwa and the Defendant by Mr. Charles Mbogo. It was agreed that the matter proceeds by way of written submissions which were duly filed by Counsel. I will refer to the submissions in the course of consideration of the questions/issues raised in the application.

Issue 1: Whether the Applicant is entitled to foreclose and sell the mortgaged property of the mortgagor, to recover all the sum of money due in respect of the principal debt, interest and other incidental charges.

Counsel for the Plaintiff submitted that the suit was based upon Order 37 Rule 4 of the Civil Procedure Rules (CPR) which permitted a mortgagee with legal or equitable interest to take out Originating Summons for such a relief

including sale, foreclosure, and delivery of possession by the mortgagor, among others. Counsel submitted that in the instant case, the Defendant handed over her certificate of title to the Plaintiff after she was advanced a loan of USD 255,728 and the Plaintiff was still in custody of the said certificate of title. Counsel submitted that the Defendant had in paragraph 8 of her affidavit in reply admitted her indebtedness; though she goes ahead to contradict herself in paragraphs 4, 5, and 6 of her affidavit when she states that the said loan was given to Joma Investments Co. Ltd and not to her, which was untruthful. Counsel contended that such a claim by the Defendant could not be true since the Defendant had not availed any evidence by way of a board resolution allowing the Company to borrow which was the only way the Company could access a loan under the law.

Counsel for the Plaintiff further submitted that since the Defendant had failed to pay back the sums that were advanced to her, the Plaintiff as the mortgagee was, pursuant to Section 20 of the Mortgage Act, entitled to foreclose and sale the mortgaged property so as to recover all the money due in respect of the principal debt, interest and other incidental charges. Counsel submitted that pursuant to Section 19 (1) of the Mortgage Act, the Defendant had been served with a notice of indebtedness requiring her to rectify her default to no avail. Counsel prayed that the Defendant be found in default and the Plaintiff be granted the reliefs claimed.

In reply, Counsel for the Defendant submitted that this was not a fit and proper case to be commenced by way of Originating Summons since it involved complex and contentious issues. Counsel submitted that in the instant case, the Defendant asserted that the Plaintiff extended the soft loan to JOMA Investments Co. Ltd and, as such, the Plaintiff had no locus to sue the Defendant personally. Counsel argued that this presented a contentious matter and required rendering of evidence. Counsel relied on ***Humphrey Opio vs Jasfa Okot H.C Misc. Cause No. 51 of 2002 (Kagaba J.); Nakabugo vs Serunjogi (1981) HCB 58;*** and ***Zalwango Elivason & Anor vs Dorothy Walusimbi & Anor H.C O.S No. 3 of 2013 (Namundi J.);*** to

submit that Originating Summons deal with matters which are not contentious as Order 37 of the CPR was created and intended to deal with simple and non-contentious matters. Counsel submitted that the procedure was intended for situations where there would be no need of rendering or taking of evidence in order to arrive at the relief prayed for. Counsel concluded that when disputed facts are complex and involve a considerable amount of oral evidence, an Originating summons was not a proper procedure to take.

Counsel for the Defendant further submitted that the Plaintiff did not also come to court with clean hands because in paragraph 4 of his affidavit in support, he states that the Defendant accepted to pay the monies together with bank interest which is a false statement as they did not agree to such a thing. Counsel submitted that this too entailed a contentious issue which could not be tried by originating summons. Counsel prayed that the application be dismissed with costs.

In a rejoinder, Counsel for the Plaintiff submitted that the Defendant in her evidence agrees that she reached out to a friend, Mr. Sateesh, a Director in the Plaintiff Company for a soft loan to enable her (Defendant) pay off a loan of her Company (Joma Investments Co. Ltd). Counsel submitted that the Defendant neither denies the existence of the loan nor does she seriously dispute the amount in any way. She only contests that she was the borrower personally and the agreement that she was supposed to pay back within one year with bank interest. Counsel submitted that in her evidence, the Defendant does not exhibit or in any way bring out evidence to show that her Company applied for and was granted a loan by the Plaintiff. Counsel submitted that under company law, a Company can only borrow upon a board resolution duly registered with the Company Registry. Such document could only be availed by the Defendant who alleged that the Company was indebted to the Plaintiff. Counsel therefore prayed that the reliefs sought by the Plaintiff be granted.

I will first examine whether the arrangement between the Plaintiff and the Defendant amounted to a mortgage under the Mortgage Act No. 8 of 2009. Under **Section 3 (1) of the Mortgage Act**, a person holding land under any form of land tenure, may, by an instrument in the prescribed form, mortgage his or her interest in the land or a part of it to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition. From the evidence on record, the form of agreement between the parties is not clear. What is clear is that it was not in the form prescribed in the Mortgage Regulations No. 2 of 2012.

Under **Section 3 (4) of the Mortgage Act**, a mortgage created under subsection (1) shall only take effect when registered. However, notwithstanding sub-section (4) above, an unregistered mortgage shall be enforceable between the parties. **Section 3 (8)** thereof provides:

Nothing in this section shall operate to prevent a borrower from offering and a lender from accepting—

(a) an informal mortgage; or

(b) a deposit of any of the following—

(i) a certificate of customary ownership;

(ii) a certificate of title issued under the Registration of

Titles Act;

(iii) ...

(iv) ...

(v) ...

to secure any payments which are referred to in subsection (1).

According to **Section 2 of the Mortgage Act**, an informal mortgage includes an equitable mortgage. From the reading of **sub-section (8) of Section 3 of the Mortgage Act**, any arrangement whereupon a borrower offers and a lender accepts a deposit of a certificate of title issued under the Registration of Titles Act to secure any payments as envisaged in sub-section (1) of Section 3 of the Mortgage Act, operates as a mortgage. The arrangement

between the Plaintiff and the Defendant herein falls in this category and therefore amounts to a mortgage agreement between the parties.

The next aspect to be examined is whether the matter before the Court was a fit and proper one to be entertained under Originating Summons. It was submitted by Counsel for the Defendant that this was not a fit and proper case to be commenced by way of Originating Summons since it involved complex and contentious issues, namely, the assertion by the Defendant that the Plaintiff extended the soft loan to JOMA Investments Co. Ltd and not to the Defendant personally which presented a contentious matter and required rendering of evidence; and the claim that the Plaintiff did not come to court with clean hands for making a statement in his affidavit in support to the effect that the Defendant accepted to pay the monies together with bank interest which was a false statement as there was no such agreement. Counsel submitted that these aspects entailed contentious issues that could not be tried by originating summons.

On his part, Counsel for the Plaintiff submitted that this was a simple and straight forward matter which did not require further investigation and could be determined upon Originating Summons pursuant to Order 37 Rule 4 of the CPR. Counsel submitted that the Defendant neither denied receiving the money nor the fact of indebtedness. The Defendant also never disputed the fact that her certificate of title was still in the Plaintiff's custody for reason of the same loan. Counsel contended that there was simply no contention except the one being created at the Bar.

Order 37 Rule 4 of the CPR provides –

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.

The above provision is clear in my view. The Plaintiff as a mortgagee is entitled to take out as of course an originating summons for a relief such as sale or foreclosure so as to recover any monies due under the mortgage. On the facts of the matter before court, the Plaintiff led evidence to show that the arrangement for the loan was between the Plaintiff's Director (Mr. Sateesh) and the Defendant directly. The Plaintiff attached on the affidavit in support and in rejoinder an email correspondence dated 30th June 2015 in which the Defendant was negotiating the loan advance. Below I quote it verbatim:

"Hi Sateesh

I hereby present an alternative proposal for consideration.

I di[d] indicate to you previously that I wanted to sell the commercial building (which is the security in the bank) and settle all the bank loans.

That Insignia lends me \$350,000 at a reasonable rate which I repay with my salary \$2500 monthly then I pay the outstanding money in December 2018 when I receive my National Social Security Savings which at that time depending on the \$ exchange rate would range between \$200,000 - \$240,000 ... Until I'm 55, I cant access this money.

I can provide my salary slips and NSSF statement.

I would like to save this property including [t]he hatchery as I know it's potential.

Cissy"

Clearly, there is no involvement of JOMA Investments Co. Ltd in this proposal. The Defendant is making personal undertakings and even staking as much as her personal salary and NSSF savings. The situation remained as clear four years later when repayment of the money was being demanded. Verbatim, this is what the Defendant writes in an email dated 15th May 2019:

“Dear Sateesh

Sorry for the delayed response. I would first of all like to take this opportunity to appreciate the patience of Insignia over the past 3 years regarding the loan advanced to me.

I humbly request to give me some more 6 months to organize the sources of the repayment and then pay over the next 6 months. This may include putting up the structure up for sale.

Hope this proposal is acceptable to you and your partners.

*Regards,
Cissy”*

These and more correspondences were attached to the affidavits both in support and in rejoinder sworn on behalf of the Plaintiff. The Defendant did not dispute the correspondences. She actually completely kept quiet about them. The said email correspondences are quite believable and settle any contentions raised in the affidavit in reply and the submissions of Counsel for the Defendant. I am indeed in agreement with learned Counsel for the Plaintiff that there was nothing contentious about the transaction between the parties herein. The claim for interest by the Plaintiff does not make the

matter contentious either. If there is no evidence to support the same, it just collapses with no effect on the principal claim.

It is therefore my finding that the matter was properly brought by way of originating summons. It ought to be resolved on merit.

I now move to consider the question whether the Plaintiff is entitled to sell the mortgaged property to recover the outstanding monies in respect of the principal debt, interest and other incidental charges.

It was shown in the affidavit in support that when the Defendant failed to pay back the money as agreed and even upon subsequent promises for her to make good her obligations, she was served with a notice of default/indebtedness. The notice was dated 15th July 2019 and was annexed to the affidavit in support. This evidence was not rebutted by the Defendant. Although the notice served was not in accordance with the prescribed form under Section 19 of the Mortgage Act, I have found that the contents of the notice that was served sufficiently satisfied the legal requirement for service of a notice to a mortgagor under the Mortgage Act. The Defendant neither responded to the notice nor effected any payment. The Plaintiff therefore brought this suit seeking an order of sale of the mortgaged property.

I find that the suit by the Plaintiff is in compliance with the provisions of Section 20 of the Mortgage Act and, pursuant to paragraph (e) thereof, the Plaintiff is entitled to an order of sale of the mortgaged land so as to recover the outstanding sum under the mortgage. According to the evidence, the sum outstanding is contained in the evidence of the Plaintiff, to wit **USD 255,728**. This amount is consistently referred to in the documents attached to the affidavit in support including the affidavit in support of a caveat filed way back in April 2017. The Defendant casually disputed this amount but adduced no evidence to rebut the Plaintiff's evidence as to the actual amount due and outstanding. I have therefore believed the Plaintiff's

evidence that the principal amount due is USD 255,728; which the Plaintiff is entitled to recover by way of sale of the mortgaged property. Consequently, the Plaintiff shall be entitled to an order of vacant possession in order to enable them execute the sale in accordance with the law.

As was contended by the Defendant, there was no evidence of any agreement as to interest. The claim for interest from the date of default therefore fails. The Plaintiff will however be entitled to payment of interest from the date of institution of this suit till full payment in accordance with Section 26 (2) of the Civil Procedure Act. From the evidence before the Court, I will award interest to the Plaintiff at the rate 15% p.a. from the date of institution of the suit till full realization of the principal sum.

The first issue is therefore answered in the affirmative.

Issue 2: Whether the Applicant is entitled to sell the said mortgaged property by private treaty or public auction to recover the entire sum due to it together with costs and expenses related thereto.

Under Section 26 of the Mortgage Act, the mortgagee who has complied with Section 19 of the Act (service of notice of default), may exercise his/her power of sale of the mortgaged property upon service of a notice to sell in the prescribed form on the mortgagor and shall not proceed to complete any contract for the sale of the mortgaged land until twenty one working days have lapsed from the date of the service of the notice to sell. Alternatively, the mortgagee may seek an order of Court before sale.

A mortgagee who exercises a power to sell the mortgaged land, including the exercise of the power to sell under an order of a court, owes a duty of care to the mortgagor, to take all reasonable steps to obtain the best price as prescribed in the regulations (**Section 27 (1) of the Mortgage Act**).

Where a mortgagee becomes entitled to exercise the power of sale, that sale may be by public auction, unless the mortgagor consents to a sale by private treaty (**Section 28(1)(d) thereof**). **Regulation 8(1) of the Mortgage Regulations S.I No. 2 of 2012** however provide that a mortgagee exercising a power of sale under the Act shall subject to the Act and these Regulations, sell the mortgaged property by public auction.

Under **Regulation 9 thereof**, where the court makes an order for sale of mortgaged property, the sale shall be conducted in the manner directed by court. Sale by private treaty may only be with the consent of the mortgagor (**Regulation 10**).

In the instant case, since there is no consent between the parties as to sale of the mortgaged property by private treaty, I will order that the sale be conducted by public auction in accordance with the provisions of Sections 27 and 28 of the Mortgage Act and regulations 8 and 9 of the Mortgage Regulations. These provisions shall be strictly adhered to.

Issue 3: Whether the Plaintiff/Applicant is entitled to costs of this suit.

Under Section 27 of the Civil Procedure Act, costs of a suit follow the event and a successful party is entitled to costs unless, for good cause, the court orders otherwise. In the instant case, there is no reason as to why the Plaintiff should not be awarded costs. I accordingly make an order of costs for the Plaintiff against the Defendant.

In all therefore, the suit by the Plaintiff succeeds. I therefore enter judgment for the Plaintiff against the Defendant with the following orders:

1. The Plaintiff is permitted to exercise their power of sale over the mortgaged land comprised in Busiro Block 274 Plot 214, Land at Mpunga, so as to recover the outstanding sum of USD 255,728 under the mortgage executed between the Plaintiff and the Defendant.
2. The Plaintiff is granted an order of vacant possession of the suit land in order to execute the sale in accordance with the law.

3. The sale shall be by public auction in accordance with the provisions of the Mortgage Act and the Regulations.
4. The outstanding sum in (1) above shall attract interest at the rate of 15% p.a. from the date of institution of this suit till full recovery of the principal sum.
5. The Plaintiff is awarded the costs of this suit.

It is so ordered.

Signed, dated and delivered by email this 28th day of May, 2020.



BONIFACE WAMALA
JUDGE