

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT No. 0007 OF 2021 (OS)

5 **HOUSING FINANCE BANK LIMITED PLAINTIFF**

VERSUS

1. SENINDE MARGARET }
2. KIWEWA MARVIN } **DEFENDANTS**

10 **Before: Hon Justice Stephen Mubiru.**

JUDGMENT

a) The Plaintiff's claim;

15 By an application dated 18th July, 2011 the 1st defendant applied for a loan in the sum of shs. 150,000,000/= for completion of the construction of a residential building. By a letter dated 5th September, 2011 the plaintiff offered the 1st defendant the said loan at an interest rate of 18.5% per annum, repayable within a period of sixteen (16) years, by monthly repayments of shs. 2,441,928/= As security for that borrowing, the 1st defendant offered a title deed in respect of
20 which she and the 2nd defendant were the registered proprietors of land comprised in Kyadondo Block 244 Plot6170 being 0.084 hectares of land situated at Kisugu, in Kampala, in respect of which the plaintiff registered a legal mortgage on 14th November, 2011. When the 1st defendant defaulted on the loan, it was issued with a default notice dated 14th November, 2019 to rectify the default. The 1st defendant having since then failed to rectify the default, the plaintiff on 14th
25 September, 2020 advertised the security for sale. The property was re-advertised for sale on 25th August, 2021 but the defendant made access to the property for purpose of valuation and inspection impossible, hence this suit, in respect of which none of the defendants filed a defence.

b) The issues to be decided;

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According to Order 37 rule 4 of *The Civil Procedure Rules*, any mortgagee, 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, re-conveyance or delivery of possession by the Mortgagee.

5 Originating Summons (OS) is one of the two modes of commencing a civil suit. A suit is commenced by this mode where the dispute concerns matters of law, and there is unlikely to be any substantial dispute of fact. The affidavits are the pleadings for the case. The affidavit filed in support serves as the plaint, while the affidavit in reply serves as the written statement of defence. This procedure exists in the interests of efficiency and cost. It provides a simple, informal, expeditious and inexpensive method of obtaining a final judgment, where no oral evidence is
10 required, and the proceedings can be determined by way of affidavit evidence. An originating summons is the appropriate procedure where the main point at issue is one of construction of a document or statute or is one of pure law. It is not appropriate where there is likely to be any substantial dispute of facts that the justice of the case would demand the settling of pleadings.

15 The plaintiff should set out in the originating summons a concise statement of the questions which the plaintiff seeks the court to decide or answer, or, a statement of the relief or remedy claimed (where appropriate). The originating summons should also contain sufficient particulars to identify the cause of action in respect of which the plaintiff claims the relief or remedy. In the instant case, the issues raised for trial are as follows:

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1. Whether the plaintiff (mortgagee) is entitled to foreclose and sell the mortgaged property of the mortgagor to recover all sums of money due in respect of the principal debt, interest and other incidental charges.
 2. Whether the mortgagee is entitled to sell the property by private treaty or public auction.
 3. Whether the plaintiff is entitled to an order of vacant possession of the suit property.

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 4. Whether the plaintiff should be granted the costs of the suit.

c) The submissions of counsel for the plaintiff:

Although he was accorded time to do so, counsel for the plaintiff did not file submissions.

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d) The decision:

In all civil litigation, the burden of proof requires the plaintiff, who is the creditor, to prove to court on a balance of probability, the plaintiff's entitlement to the relief being sought.

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1st issue; whether the plaintiff (mortgagee) is entitled to foreclose and sell the mortgaged property of the mortgagor to recover all sums of money due in respect of the principal debt, interest and other incidental charges.

10 Foreclosure is the legal process that allows lenders to recover the balance owed on a defaulted loan by taking ownership of and selling the mortgaged property as collateral. The equity of redemption is a right given to the mortgagor over the mortgaged property, which includes the right to redeem the property on full repayment of the secured debt (see sections 8 (1) and 32 of *The Mortgage Act, 8 of 2009*). The mortgagor may redeem the mortgaged property on paying the full amount,
15 including costs found due to the plaintiff. A final order of foreclosure usually puts an end to the equity of redemption and is valid against all defendants. Once obtained, the plaintiff obtains title to the property free and clear of the interests of the defendants and may therefore proceed to take possession or transfer the property to a purchaser.

20 Through a suit for foreclosure, the mortgagee becomes the owner of the mortgaged property and those interests subsequent to the mortgage in priority will lose their interest in the mortgaged property. Suits for foreclosure appeal to mortgagees where the value of the property at the time is not sufficient to repay the mortgage debt. If a mortgagee seeks to take possession of the mortgaged property, (because the property value exceeds the mortgage debt, or the estate market is depressed,
25 and the value may increase over time) a suit for foreclosure may be more favourable. Court will order a foreclosure where it appears the value of the property is unlikely to satisfy the plaintiff's claim.

The mortgagee has the option of taking possession until the default which was the cause of the
30 entry into possession has been rectified through the possession of the mortgagee, or until the mortgagee has exercised the power of sale (see section 25 (c) and (d) of *The Mortgage Act, 8 of*

2009). In a suit for foreclosure, following a final order of foreclosure, the mortgagor and subsequent encumbrancers are absolutely debarred and foreclosed of and from all right, title and equity of redemption of, in and to the mortgaged lands. This means that the mortgagors no longer have equity in the property which could support a claim to any right to request relief. An order of
5 “foreclosure and sale” would thus be preferable for a defendant in situations where the value of the property exceeds the amount owing on the mortgage.

Borrowers may stop the process of foreclosure by redeeming their property before a foreclosure sale. To redeem the property, the borrower need to pay the full balance due before the foreclosure
10 sale. Alternatively, the borrower may prove that the foreclosing mortgagee did not comply with the foreclosure laws or the terms of the mortgage. The defendants not having sought to assert their right of redemption, and not having challenged the process, it is hereby ordered and adjudged that the right, title and equity of redemption of both defendants to and in the mortgaged property described as Kyadondo Block 244 Plot6170 being 0.084 hectares of land situated at Kisugu, in
15 Kampala, is hereby foreclosed.

2nd issue; whether the mortgagee is entitled to sell the property by private treaty or public auction.

20 A mortgagee has the option to enforce their mortgage security through a foreclosure or judicial sale but for the most part, the exercise of a contractual or statutory power of sale is the more favourable remedy for mortgagees. If the mortgage contract does not contain a power of sale provision, statutory power of sale provisions are set out in Part V of *The Mortgage Act, 8 of 2009* and are deemed to apply unless expressly excluded.

25 If a mortgagee seeks to enforce their security as quickly and cost effectively as possible, a sale by private treaty is the appropriate remedy. In the instant case, the mortgage did not reserve that power in the mortgage deed. However, according to section 28 (1) (d) of *The Mortgage Act, 8 of 2009*, where a mortgagee becomes entitled to exercise the power of sale, that sale may be by public
30 auction, unless the mortgagor consents to a sale by private treaty. In the instant case the defendants have not consented to a sale by private treaty. Furthermore, according to Regulation 8 (1) of *The*

Mortgage Regulations, 2012 a mortgagee exercising a power of sale under the Act must subject to the Act and the Regulations, sell the mortgaged property by public auction.

5 Sales by public auction provide the mortgagor with a lengthier notice period and a court supervised process. The theory of the public auction is that the mortgagor as owner of a substantial equity is assured of having its value returned to him as “surplus moneys,” or at worst, that in case the competitive bidding for the property fails to bring a price equal to the debt and costs, it will at any rate fix the true value of the mortgaged property and so limit to a just amount any deficiency judgment which may be entered.

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That notwithstanding, sale by public auction can also be much more costly. This is because section 28 (2) thereof requires that where a sale is to proceed by public auction, it is the duty of the mortgagee to ensure that the sale is publicly advertised in advance of the sale by auction in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the mortgaged land may include but not be limited to the mortgagee placing an advert including a colour picture of the mortgaged property, in a newspaper which has wide circulation in the area concerned, specifying the place of the auction, and the date of the auction, being no earlier than thirty days from the date of the first advert.

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20 For all intents and purposes, the lengthy judicial foreclosure process is intended to benefit the mortgagor by giving him or her every opportunity to remedy the default, modify the terms of the loan, and redeem the property prior to foreclosure. In the same vein, statutory provisions for sale favour a public auction to a sale by private treat mainly because matters of foreclosure are uniquely equitable in nature despite certain limitations stemming from the nature of the *in rem* proceedings.

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Accordingly, it is ordered and decreed that sale of the mortgaged property in the instant case shall by public auction in accordance with the relevant provision of *The Mortgage Act, 8 of 2009* and *The Mortgage Regulations, 2012*.

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3rd issue; whether the plaintiff is entitled to an order of vacant possession of the suit property.

The power of sale allows the mortgagee to convey the mortgaged property to a purchaser, free and clear of the interest of the mortgagor and any other subsequent interests in the property. The
5 defendants' right, title and equity of redemption to and in the mortgaged property described as Kyadondo Block 244 Plot6170 being 0.084 hectares of land situated at Kisugu, in Kampala, having been foreclosed, it is ordered and adjudged that the defendants forthwith deliver to the plaintiff or as the plaintiff directs, possession of the mortgaged property or of such part of it as is in the possession of the defendants.

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4th issue; whether the plaintiff should be granted the costs of the suit.

The general rule under section 27 (2) of *The Civil Procedure Act* is that costs follow the event unless the court, for good reason, otherwise directs. This means that the winning party is to obtain
15 an order for costs to be paid by the other party, unless the court for good cause otherwise directs. I have not found any special reasons that justify a departure from the rule. Therefore in conclusion, judgment is entered for the plaintiff against the defendants jointly and severally, as follows;

- a) The right, title and equity of redemption of both defendants to and in the mortgaged
20 property described as Kyadondo Block 244 Plot6170 being 0.084 hectares of land situated at Kisugu, in Kampala, are hereby foreclosed for purposes of sale.
- b) Sale of the said mortgaged property shall by public auction in accordance with the relevant provision of *The Mortgage Act, 8 of 2009* and *The Mortgage Regulations, 2012*.
- c) For the purposes of that sale, the defendants are ordered forthwith to deliver to the plaintiff
25 or as the plaintiff directs, possession of the mortgaged property or of such part of it as is in the possession of the defendants.
- d) The costs of the suit.

Delivered electronically this 16th day of May, 2022

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.....Stephen Mubiru.....
Stephen Mubiru
Judge,
16th May, 2022.