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

ORIGINATING SUMMONS No. 06 OF 2021

IN THE MATTER OF LAND COMPRISED IN BLOCK 261 PLOTS 939 AND 942

10

LAND SITUATED AT LUKULI

AND

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

15

HOUSING FINANCE BANK LIMITED PLAINTIFF/MORTGAGEE

VERSUS

MAYANJA ABDU TONDO

T/A MAT HOTEL AND LEISURE CENTRE DEFENDANT /MORTGAGOR

20

BEFORE: HON. LADY JUSTICE SUSAN ABINYO

JUDGMENT

Introduction

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The Plaintiff brought this suit against the Defendant by Originating summons under Order 37 Rules 4 and 8 of the Civil Procedure Rules SI No. 71-1, and the provisions of sections 20(d), 26, 27 and 28 of the Mortgage Act, 2009, and Regulations 8 and 9 of the Mortgage Regulations SI No. 2 of 2012, seeking the determination of the following questions:

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1. Whether the Defendant/Mortgagor having failed to pay the Plaintiff's/Mortgagee's outstanding monies in the sums of UGX 258,953,301 should be foreclosed of his right to redeem the mortgaged properties?
2. Whether the Plaintiff/ Mortgagee should evict the Defendant from the mortgaged properties?

3. Whether the Defendant should give free access to the Plaintiff/ Mortgagee to enter, inspect and revalue the mortgaged properties?
4. Whether the Plaintiff/ Mortgagee should be permitted to sell the mortgaged properties upon foreclosure in accordance with the law?
5. Whether the Plaintiff /Mortgagee should be granted costs of this suit?

10 Facts

The Plaintiff's Manager Credit at Head Office Branch, Mr. Byabazaire Richard deponed the affidavit in support of the originating summons in paragraphs 1-20 as follows:

15 That on the 20th day of November, 2012, the Defendant made an application to the Plaintiff for a loan facility. A copy of the loan application is hereto attached and marked Annexure" B". That on the 9th day of September, 2013, the Plaintiff made an offer to advance the Defendant a sum of UGX 236, 000,000(Uganda Shillings Two Hundred Thirty Six Million only), payable in 10 years with a variable interest of 20.5% per annum, which was the then Bank's prime lending rate, and
20 that the same was accepted by the Defendant. A copy of the offer letter is attached, and marked Annexure" C".

That on 23rd September, 2013 the Plaintiff and the Defendant executed a Mortgage Deed wherein, the Plaintiff (hereinafter referred to as the "Mortgagee") agreed to advance to the Defendant (hereinafter referred to as the
25 "Mortgagor") a loan facility of UGX 236,000,000 (Uganda Shillings Two Hundred Thirty Six Million only). A copy of the Mortgage Deed is attached, and marked Annexure" D". That the Mortgagor executed a Deed of assignment with the Mortgagee on the 23rd day of September, 2013 wherein, the Mortgagee agreed to punctually bank all sale proceeds from its business on its account No.
30 0121142300700. A copy of the said Deed of assignment is attached, and marked Annexure "E".

That the loan was secured with land comprised in Block 261 Plots 939 and 942 land at Lukuli-Kyadondo (mortgaged property), registered in the name of the Mortgagor. Copies of the Certificates of Title are attached, and marked
35 Annexures "F" & "G" respectively. That the Mortgagee performed its obligation, and advanced to the Mortgagor the loan as agreed.

5 That the Mortgagor defaulted in payment of the loan, and has failed to clear his indebtedness despite service of all the required notices upon him, and as a result, the total outstanding amount inclusive of interest and other charges as of 16th September, 2021 stands at UGX 258,953,301 (Uganda Shillings Two Hundred Fifty Eight Million Nine Hundred Fifty Three Thousand Three Hundred One only). A copy
10 of the loan statement is attached and marked Annexure "H". That pursuant to the Mortgage Deed, the Mortgagor had to give free access to the Mortgagee in order for it to enter, inspect, and revalue the mortgaged property upon her default.

Representation

15 The Plaintiff was represented by Counsel Mukasa Jonathan of Rem Advocates. Service of Court process upon the Defendant was effected through the Monitor newspaper of 1st April, 2022, however, the Defendant failed to file a reply to the suit. This Court directed Counsel for the Plaintiff to proceed exparte, and file written submissions, which was complied with.

20 Questions for determination

1. Whether the Defendant/Mortgagor having failed to pay the Plaintiff's/Mortgagee's outstanding monies in the sums of UGX 258,953,301 should be foreclosed of his right to redeem the mortgaged properties?

25 Counsel reiterated the evidence of the Plaintiff in paragraphs 5, 6, 9, 12, 13, 14 and 15 of the affidavit in support of this application, to submit that the Defendant having failed to perform his obligation of clearing his indebtedness, the Plaintiff is entitled to foreclose the Mortgagor's right to redeem the mortgaged property, and that it is the only available option for the Plaintiff to realize the outstanding monies of the loan.

30 Counsel further cited the provision of Order 37 Rule 4 of the Civil Procedure Rules, and relied on the case of *Housing Finance Bank Limited Vs Seninde Margaret & Anor Civil Suit No. 0007 of 2021 (OS)*, to submit that the Plaintiff performed all the required legal steps of advertising the property, and effective service of the required notices to the Defendant but the Defendant still declined to clear his
35 indebtedness. That the Defendant's right to redeem the mortgaged property be foreclosed in order for the Plaintiff to sale the same, and realise the outstanding monies of the loan in UGX 258,953,301 (Uganda Shillings Two Hundred Fifty Eight Million Nine Hundred Fifty Three Thousand Three Hundred One only).

5 Decision

Order 37 Rule 4 of the Civil Procedure Rules SI 71-1 provides that:

10 “ 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 foreclosure 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.”

15 In construing the above provision, the Mortgagee may apply to Court by originating summons for the following reliefs; foreclosure, delivery of possession by the mortgagor, and sale on a mortgage whether legal or equitable.

20 The term foreclosure means a legal proceeding to terminate a Mortgagor's interest in property, instituted by the Lender (the Mortgagee), either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property. (**See Black's Law Dictionary, Ninth Edition pg 719**)

Section 8(1) of the Mortgage Act No. 8 of 2009 provides that:

25 “On and after the date of the commencement of this Act, a mortgage shall have effect as a security only and shall not operate as a transfer of any interest or right in the land from the mortgagor to the mortgagee; but the mortgagee shall have, subject to this Act, all the powers and remedies in case of default by the mortgagor and be subject to all the obligations conferred or implied in a transfer of an interest in land subject to redemption.” (Emphasis is mine)

30 Section 20 of the Mortgage Act, provides for the remedies of the mortgagee as follows:

“Where the mortgagor is in default and does not comply with the notice served on him or her under section 19, the mortgagee may—

(a) require the mortgagor to pay all monies owing on the mortgage;

(b) appoint a receiver of the income of the mortgaged land;

5 (c) lease the mortgaged land or where the mortgage is of a lease, sublease the land;

(d) enter into possession of the mortgaged land; or

(e) sell the mortgaged land.

10 A mortgagor will be deemed to be in default, when the mortgagor fails to meet any obligation to pay the principal sum on demand or interest or any other periodic payment or any part of it under the mortgage, after the lapse of a period of 30 days from the date when the obligation to pay becomes due. (**See section 19(4) of the Mortgage Act**)

15 It's an established principle in law that failure to file a defence raises a presumption or constructive admission of the claim made in the plaint and the Plaintiffs story must be accepted as the truth. (**See United Building Services Limited Vs Yafesi Muzira T/A Quickset Builders and Co. H.C.C.S No. 154 of 2005**)

20 In the instant case, it was the Plaintiff's evidence that a sum of UGX 236,000,000 (Uganda Shillings Two Hundred Thirty Six Million only), was advanced to the Defendant in a loan facility, and that the Defendant agreed to punctually pay. That the loan was secured with land comprised in Block 261 Plots 939 and 942 land at Lukuli - Kyadondo (mortgaged property) registered in the name of the Defendant, and that the Mortgagor executed a Deed of assignment with the Mortgagee on the 23rd day of September, 2013 wherein, the Mortgagee agreed to punctually bank all sale proceeds from its business on its account No. 0121142300700. That the Defendant defaulted in payment of the loan, and has failed to clear his indebtedness, despite service of all the required notices upon him by the Plaintiff.

30 The Plaintiff's evidence as above, was uncontested by the Defendant, who failed to file a reply to the suit. This Court therefore finds that the Plaintiff has discharged the evidential burden to the required standard, and proved that the Defendant is in total breach of the credit facility agreement, having failed to clear its indebtedness in the sums of UGX 258,953,301 (Uganda Shillings Two Hundred Fifty Eight Million Nine Hundred Fifty Three Thousand Three Hundred One only).

35 In the result, this question is answered in the affirmative that the Mortgagor, having failed to pay the Mortgagee's outstanding monies in the sums of UGX 258,953,301, (Uganda Shillings Two Hundred Fifty Eight Million Nine Hundred Fifty Three

5 Thousand Three Hundred One only), be foreclosed of its right to redeem the mortgaged properties.

2. Whether the Plaintiff/ Mortgagee should evict the Defendant from the mortgaged properties?

10 It was submitted for the Plaintiff that this Court makes an order evicting the Defendant from the mortgaged property after foreclosing his right to redeem the same, so that the Plaintiff can successfully sale the property to realize the outstanding balance of the loan.

15 This Court found in (1) above, that the Mortgagor be foreclosed of its right to redeem the mortgaged properties as it defaulted to pay the loan; It follows that the Mortgagor, who is still in possession of land comprised in Block 261 Plots 939 and 942 land at Lukuli –Kyadondo (mortgaged property), be delivered to the Plaintiff.

20 This Court therefore, makes orders for eviction of the Mortgagor from the mortgaged properties in accordance with the provision of section 20(d) of the Mortgage Act above, that gives a Mortgagee the right to enter possession when the Mortgagor defaults, which is the case here.

3. Whether the Defendant should give free access to the Plaintiff/ Mortgagee to enter, inspect and revalue the mortgaged properties?

25 Counsel reiterated the Plaintiff's evidence under paragraph 18 of the affidavit in support that the Defendant blocked the Plaintiff from accessing the mortgaged property and it could not make free entrance, inspect and value of the same and yet there is need to make a valuation report before the property is sold, to submit that this Court makes an order that the Defendant gives free access of the mortgaged property to the Plaintiff, to enable it to successfully take all the required legal steps to sell the mortgaged property, and realize the outstanding monies of the loan.

35 In the given circumstances of this case, where the mortgagor is in default, and has not complied with the notice served on him or her as required under section 19, the mortgagee has the right to enter into possession of the mortgaged land, in accordance with the provision of section 20 (d) above of the Mortgage Act.

This Court finds in the affirmative that free access be given by the Mortgagor to the Mortgagee to enter, inspect, and revalue the mortgaged properties.

5 4. Whether the Plaintiff/ Mortgagee should be permitted to sell the mortgaged properties upon foreclosure in accordance with the law?

Order 37 Rule 4 of the Civil Procedure Rules SI 71-1 cited above, provides for the rights of the mortgagee to include foreclosure, and sell of the mortgaged property, in order to recover the monies due to it from the Mortgagor.

10 I have looked at clause 14.2 of the letter of offer of the Mortgage, in which, it was stated that, in the case where the loan facility is further secured under a mortgage, the lender shall be at liberty to exercise its rights as a mortgagee.

Section 20(e) of the Mortgage Act, provides for the remedy of sell of mortgaged land by the Mortgagee, where the mortgagor is in default, and does not comply
15 with the notice served on him or her as required under section 19 of the Act.

In the instant case, it is not in dispute that the Defendant defaulted, and he did not respond to the notices that were served upon him.

In the result, I find that the Mortgagee has a right to sell the mortgaged properties upon foreclosure in accordance with the law.

20 With regard to costs, section 27 (1) of the Civil Procedure Act, Cap 71 provides as follows:

“subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court or Judge, and the Court or Judge shall
25 have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid.”

Taking into consideration the above provision on costs, and that costs follow the event unless for justified reasons the Court otherwise orders (See section 27(2) of
30 the Civil Procedure Act, Cap 71), and the decision in **Uganda Development Bank Vs Muganga Construction Co. Ltd (1981) H.C.B 35** where Justice Manyindo (as he then was) held that:

“A successful party can only be denied costs if its proved, that, but for his
35 or her conduct, the action would not have been brought, the costs will follow the event where the party succeeds in the main purpose of the suit.”

5 I find no reason to deny the Plaintiff costs, and accordingly the Plaintiff is awarded costs of this suit.

For reasons above, this Court enters Judgment for the Plaintiff against the Defendant in the following terms:

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1. An Order that the Defendant gives free access to the Plaintiff to enter, inspect, and revalue the mortgaged property.
 2. An Order of eviction against the Defendant from the mortgaged property.
 3. An Order that the Plaintiff sells the mortgaged property.
 4. Costs of this suit are granted to the Plaintiff.

Dated, signed and delivered by email this 30th day of August, 2022.

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SUSAN ABINYO
JUDGE
30/08/2022

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