

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

MISCELLANEOUS CAUSE NO. 0101 OF 2023

BIYINZIKA ENTERPRISES LIMITED ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

CAIRO BANK UGANDA LIMITED ::::::::::::::::::::::::::::::::::: RESPONDENT

Before Hon. Lady Justice Harriet Grace Magala

Judgment

[1] Background

This is matter that brought by way of a notice of motion under section 33 of the Mortgage Act, 2009 and section 98 of the Civil Procedure Act. The Application is for orders that:

- a) The Applicant be granted relief in respect of loan facilities /mortgages subsisting between itself as mortgagor, and the Respondent as mortgagee in the following terms:
 - (i) Setting aside a notice of default issued by the Respondent to the applicant dated 14th June 2023;
 - (ii) Setting aside a notice of sale of mortgaged property issued by the Respondent to the Applicant that was dated 11th September 2023;
 - (iii) Cancellation of an advertised sale of the Applicant's securities by the Respondent's agents in the New Vision Newspaper dated 12th September 2023 pursuant to the impugned notices;
 - (iv) An injunction issue against the Respondent and its agents preventing them from taking further action in respect of the notices dated 14th June 2023 and 11th September 2023;
 - (v) An account is ordered in respect of a re-scheduled term loan facility between the Applicant and Respondent to ascertain whether or not

the principle and interest amounts were properly computed and applied to the term loan;

- (vi) Granting a grace period in respect of repayment of principle amounts under the re-scheduled loan for a period of 12 months or such period as this honourable court deems fitting, to allow the Applicants clear all interest arrears and put their loan facilities in order;
- (vii) That this honourable court be pleased to grant such other relief as it may deem fit to preserve the Applicant's equity of redemption;
- (viii) Costs of the Application be provided for.

The Affidavit in support of the Application was deposed by Milly Mukasa, a Director of the Applicant.

The affidavit opposing the application was deposed by Victoria Catherine Larya, the Acting Company Secretary of the Respondent.

[2] Representation and Hearing

The matter was called for mention on the 5th October 2023. The Applicant was represented by Mr. Bazira Anthony of M/s Byenkya, Kihika & Co. Advocates. The Directors of the Applicant, Ms. Dinah Mukasa and Mr. Isaac Muaksa were present in Court.

The Respondent was represented by Mr. Ivan Kyateka of M/s Tumusiime, Kabega & Co. Advocates. The Ag. Corporation Secretary, Ms. Victoria Catherine Larya was present in Court.

Counsel for the Respondent submitted that there was very little time between the time they were served with the Application and the mention date. He was therefore not able to upload the Affidavit in Reply on ECCMIS but he had a hard copy on him. The court appreciated the time constraints and directed the Respondent to upload the Affidavit in Reply on ECCMIS by close of business of the 6th October 2023.

During the mention of the matter, the Applicant did not deny its indebtedness to the Respondent. Ms. Dinah Mukasa, the Director of the Applicant implored the Respondent to allow them pay interest over a period of eight months and be

given a further period of one year to normalize the loan. Ms. Mukasa further informed court that there were prospects of bringing a business partner on board who would avail the much needed finances. This proposal was vehemently objected to by the Respondent for a number of reasons; one the Applicant had never approached them with such proposals, secondly the Respondent had on several occasions given the Applicant more time to normalize the loan repayment and it has been more than a year and lastly, it costs the Respondent each time they have to make a provision for such a huge debt and this is money that belonged to depositors and lending it attracted a cost.

Court, with the help of the Ag. Corporation Secretary established that as at 5th October, 2023 the Applicant's arrears stood at Ugx. 1,864,395,800 and USD \$ 13,745.23.

In light of the fact that the Applicant had not received the Affidavit in reply, the Court then gave the parties strict timelines within which to file their submissions. The Applicant was directed to file their submissions by or on the 13th October 2023 and the Respondent by or on 16th October 2023. The court's decision was scheduled to be delivered on the 27th October 2023.

The Applicant by way of a letter dated 12th October 2023 requested for more time to file an affidavit in rejoinder and their submissions. The Court on the 16th October 2023 declined to fully grant the Applicant's request. Court directed the Applicant to file their written submissions not later than 18th October 2023 and the Respondent to file their written submissions not later than 20th October 2023. The Respondent complied with the Court's directives and filed their submissions on time. The Applicant on the other hand filed their submission on the 26th October 2023 in total disregard of the Court's directives and Direction 7 of The Constitution (Commercial Court) Practice Directions.

[3] Determination

The Respondent raised a preliminary point of law regarding the requirement under Regulation 13 of the Mortgage Regulations, 2012 to deposit 30% of the forced sale value of the property or the outstanding amount.



Before I address my mind to the preliminary objection and any other issues raised by the Applicant, I would like to address my mind to the procedure adopted by the Applicant in filing this matter.

The manner in which this matter was filed was peculiar. The miscellaneous cause was brought under **section 33 (1)(a), (3) and (4) of the Mortgage Act, 8 of 2009 and section 98 of the Civil Procedure Act(CPA)**. Section 98 of the CPA refers to the inherent powers of the court to make such orders as maybe necessary for the ends of justice to be met or to prevent the abuse of the court process. The Applicant did not indicate under which rule of the Civil Procedure Rules she was proceeding. It is clear in my mind that the Applicant was trying to avoid the long route of trial by plaint and opted to file a miscellaneous cause which is a trial by affidavit evidence. Whereas I am alive to the provisions of section 33 of the Mortgage Act, the kind of issues raised by the Applicant and reliefs sought are best settled through a full trial thereby adducing oral evidence and not through affidavit evidence. **See Zalwango Elivason & Nakalema Mariam vs Dorothy Walusimbi & Henry Bijjumuko- Originating Summons 0003 of 2013**. This would require the Applicant to file an ordinary plaint. The provisions of section 33 of the Mortgage Act would then come into play thereafter by the Applicant filing a miscellaneous application seeking for certain reliefs such as an injunction pending the hearing and final determination of the main suit.

As rightly pointed out by learned counsel for the Respondent in their submissions, a miscellaneous cause is a suit in its own right. It for that reason that a decision rendered by a judicial officer in a miscellaneous cause is titled a **judgement** and not a **ruling**. The remedies sought for by the Applicant are interlocutory in nature and as such, this miscellaneous cause would not dispose of the dispute nor bring the matters in contention to finality. For instance, what would happen after an account of the re-scheduled loan term facility was ordered? At what point would the parties again appear in court to confirm that the accounts have been settled and as between the parties an agreement had been reached as to what was due and owing to the Respondent. The Applicant was also not specific on what kind of injunction was being sought for from this Court. Was it a permanent injunction or a temporary injunction? A close reading of the pleadings coupled with what



transpired in court on the day the matter came up for mention, it is clear that the Applicant is still indebted to the Respondent. If the court was so inclined to issue a temporary injunction halting the sale, this would beg the question as to when the dispute(s) between the parties would be finally resolved seeing that this is miscellaneous cause- a suit in its own right.

A notice of motion which does not bear rule under which it is premised, does not have a mother suit from which it originates and which seeks for final determination of contentious matters cannot be brought under section 33 of the Mortgage Act and section 98 of the CPA. **See the decision of Henry I. Kaweesa, J in Adam Yacob Muhammed & Barclays Bank of Uganda vs Madaya Rogers – Miscellaeous Cause No. 0014 OF 2013.**

I therefore find that this application is improperly before court and is dismissed with costs to the Respondent.

Dated at Kampala and delivered electronically on ECCMIS this 31st day of October 2023.



Harriet Grace MAGALA

Judge