THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

ORIGINATING SUMMONS NO. 0003 OF 2022

NESTA PETROLEUM (U) LTD :: PLAINTIFF

VERSUS

1. **SILCON OIL (U) LTD**
2. **ODUNG GEOFREY OYIT :: DEFENDANTS**

BEFORE HON. LADY JUSTICE HARRIET GRACE MAGALA
JUDGMENT

Brief facts

By an agreement dated *20th August 2019* executed between the Plaintiff and the Defendants, the Plaintiff agreed to supply to the Defendants petroleum products i.e. Diesel (Ago) and Petro (PMS) on credit for a consideration not exceeding **Ugx 150,000,000/- (Uganda Shillings One Hundred Fifty million only).**

The Plaintiff supplied the petroleum products for the consideration given by the defendants but the defendants paid only **Ugx 89,480,000/- (Uganda Shillings Eighty-Nine Million Four Hundred Eighty Thousand only)** leaving an outstanding amount of **Ugx 60,520,000/- (Uganda Shillings Sixty Million Five Hundred Twenty Thousand only)** unpaid.

The Defendants deposited with the plaintiff a certificate of title for land comprised in *Kyadondo Block 195 Plot 3239 at Kyanja*, herein the suit property which, now the plaintiff applies to the honorable court to sell.

The Suit

This suit was brought under **Section 98 of the Civil Procedure Act cap. 71 and Order 37 rule 4 of the Civil Procedure Rules S.I 71-1** for an order of sale of the suit property through determination of the following questions:

a) *Whether there was a valid enforceable agreement between the plaintiff and the defendants*
b) *Whether the defendant breached the terms of the agreement*
c) *Whether the plaintiff should be permitted to sell the pledged collateral comprised in Kyadondo Block 195 Plot 3239 at Kyanja Kampala to recover the amount due.*
d) *Whether the plaintiff should be granted costs of the suit.*

The application was supported by the Affidavit of Robinson Kipruto, a credit controller of the Plaintiff company who deposed that the plaintiff and the defendants entered into a supply of petroleum products agreement for supply of petroleum products to the defendants not exceeding an amount of **Ugx 150,000,000/-**. That the defendants after full supply by the plaintiff of the petroleum products paid **Ugx 89,480,000/-** only leaving an unpaid amount of **Ugx 60,520,000/-** which to date remains unpaid despite several remainders.

That the Defendants had pledged property comprised in **Kyadondo Block 195 Plot 3239 at Kyanja Kampala** as security and it can only be sold by the plaintiff through an order of court.

The defendants replied through the second defendant and deposed that the defendants were not indebted to the plaintiff as the whole sum of **UGX 154,655,360/- (Uganda Shillings One Hundred Fifty-Four Million Six Hundred Fifty-Five Thousand Three Hundred Sixty only)** was fully paid but the plaintiff refused to release the certificate of title to the defendants. He attached *annexure 'A'* as proof of payment and thus the plaintiff cannot sell the suit property and in addition, the alleged agreement was not registered.

The Defendants averred that the originating summons were premature as the plaintiff never complied with the mandatory notices under the Mortgage Act and the matters raised in the summons were contentious and could only be resolved through filing of an ordinary suit.

The plaintiff in their rejoinder stated that the statutory notices were served to the second defendant who refused to receive them and that the cheques of payment from the defendants were banked and dishonored; and that stamp duty in respect of the agreement was paid. As such the agreement is enforceable.

Representation

The Plaintiff was represented by M/s Sebbowa & Co. Advocates while the Defendants were represented by M/s Serwadda & Co. Advocates.

The parties filed their written submissions. I have had the benefit of reading the same and I shall consider them in this judgment.

Determination

This Originating summons is taken out under **Order 37 rule 4 of the Civil Procedure Rules S.I 71-1** as amended which provides that:

> *"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 2nd defendant objected to the manner in which the suit was filed under paragraph 8 of his affidavit in reply that the matters raised in this originating summons were contentious and could only be resolved in an ordinary suit.

In the case of ***Mayanja Bosco Versus Kasikururu Lois Okumu and another OS No. 005 of 2008***, **Retired Hon. Justice Joseph Murangira** observed that the essence of the procedure of originating summons is to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable court to determine matters which involve a serious question. Therefore, originating summons are intended to dispose of simple and non-contentious matters in a speedy manner. **See. *David Giruli Versus Busonya Jamada and Two others CACA No. 009 of 2009***

In ***General Parts (U) Ltd and another Versus Non-Performing Assets Recovery Trust SCCA No. 9 of 2005*, Hon. Justice Mulenga JSC (RIP)** observed that the proper mode for a mortgagee to institute foreclosure proceedings was through originating summons.

However, where the question is contentious or involves duplex evidence that will require oral testimony of witness to prove or disapprove allegations, originating summons is not the applicable procedure. **See. *Janet Ntanya Versus Saida Sebadduka and two others Originating Summons No. 020 of 2009, John Peter Nagemi T/A Nagemi & Co. Advocates Versus Ismael Semakula Civil Suit (OS) No. 008 of 2013***

In the present case, the plaintiff through its credit controller states that the defendants defaulted on their payment and as at the time filing the suit, an outstanding sum of **Ugx 60,520,000/- (Uganda Shillings Sixty Million Five Hundred Twenty Thousand only** was due as seen as under paragraphs 6, 9 and 10 of the Affidavit support of the Originating Summons.

This was however disputed by the defendants under paragraphs 5 and 6 of the 2nd defendant's affidavit in reply where he stated that all monies due were paid in full. The second defendant further alleged that there was no compliance with the service of mandatory statutory notices under the Mortgage Act.

In their affidavit in rejoinder, the Plaintiff averred under paragraph 4 that there were meetings between the parties over payment of the monies due and that the cheques issued were banked and dishonored.

I have observed that whereas the cheques from the defendants were dishonored, from the court record, including *annexure A* to the affidavit in reply, a total of Ugx. 141, 094,160/- was paid to the Plaintiff either as direct cash deposits made to the Plaintiff's bank account or as account debits by the defendants to the plaintiff during the period between 3rd December 2019 to the 25th day of March 2021. This leaves an outstanding balance of Ugx. 8,905,840/- unexplained. In the circumstances, can the plaintiff be allowed to sell the mortgaged property? I believe not. I hold this view because to allow the plaintiff to sell the property would require more evidence for non-payment of the balance or as contested by the defendants, proof of service of notices.

In my opinion, these are complex matters that require adducing of further evidence to prove all the allegations made in the suit. This includes, production of witnesses to the court and their cross examination. The question of dishonored cheques is a serious offense chargeable under the law and needs strict proof and evidence which cannot be done under originating summons.

Further, there is a question of compliance with the statutory mandatory notices under the **Mortgage Act, 2009**. This can be adduced by witnesses who served the defendants. The letters on record are not received but the plaintiff's credit controller stated that he served the defendants but the second defendant refused to acknowledge receipt. This would call for cross-examination of both the plaintiff's credit controller and the second defendant which cannot be done with the suit filed as originating summons. In ***John Peter Nagemi T/A Nagemi & Co Advocates Versus Ismael Semakula (supra)***, where the question arose as the defendant disputed enforcement of an agreement having been superseded by another agreement, the court noted that it would be improper on the basis of such allegations to determine that question without allowing parties to adduce evidence for and against the factual controversies as contained in affidavit evidence.

Further, the defendants attempted to contest the agreement for being void for non-registration.

It is a requirement of sections 3(1) and (2) of the Stamp Duty Act that a sale of land agreement as in this matter must pay stamp duty and if the same is not paid, in accordance with section 32 of the Stamp Duty Act, it is not admissible in evidence. See the decisions of **Wasukira & 2 others –vs - Harmony Group Limited HCCS No. 40 of 2009** and **Rosemary Nalubega and another –vs - Jackson Kakayira CACA No. 40 of 2004**.

However, the position of the Law has long been settled to the effect that where stamp duty is required by Law to be paid and it is not, the procedure is not to dismiss the case or disregard the instrument, but determine whether duty is payable and allow the affected party to pay stamp duty, with any penalty if applicable. See the case of **Pesa Finance Limited –vs- Louis Ntale Civil Suit No. 470 of 2009**.
In the Court of Appeal decision of **Dieter Pabst –vs- Abdu Ssozi & Another Civil Appeal No. 116 of 2000,** Byamugisha JA (RIP) in her lead judgment clearly stated as follows: -

"The decision of whether the instruments attracted duty or not ought to be made before the instrument is admitted. The party concerned ought to be given an opportunity to pay the duty so that the instrument can be used in evidence. I therefore agree with the submissions of Mr. Adriko and the authorities he cited, to the effect that the trial court should determine whether a document is dutiable or not before it is admitted in evidence. The rationale being to enable the party affected to pay the stamp duty and penalty..."

I am bound by the above decision. It is also clear from that authority that all that the Court needs to do is to determine whether the agreement in question is dutiable or not and if it is dutiable then order the plaintiff to pay the requisite duty together with the penalty. Clearly, non – payment of stamp duty is not fatal to the instrument or its admission in evidence. Indeed, in the case of **Rosemary Nalubega & Anor – vs - Jackson Kakayira CACA No. 40 of 2004**, the Court of Appeal held that: -

"That error however, is not fatal to the case because of section 43 of the Stamp Act. This section prohibits challenging at any subsequent stage of the proceedings, on ground of non-payment of stamp duty, the order admitting in evidence of an instrument, except under section 68. This section requires appellate court to take into consideration the order made by the trial judge admitting an instrument in evidence, either as duly stamped, or as not requiring stamp or upon payment of duty and penalty under section 42. Upon that consideration, to declare its opinion thereon. Where it is of the opinion that the instrument should not have been admitted in evidence without payment of duty and penalty under section 42, to determine the amount, to enable the party liable to pay. That declaration does not invalidate the lower court's order admitting in evidence, the unstamped instrument. I have considered the order made by the trial judge in the instant case admitting the sale agreement in evidence, as not requiring stamp duty. In my opinion, that agreement should not have been admitted in evidence without payment of duty and penalty under section 42. The amount payable is at least two shillings. That declaration does not invalidate the lower court's order admitting in evidence the unstamped instrument. Ground 3 would thus fail.''

In addition to the above, I have observed that the Plaintiff has since paid stamp duty on the agreement in question. Lastly, the Defendants have already benefited

from the said agreement through receipt of petroleum products, and have made payments for the same and thus estopped from contesting the same. ***See. Pan African Insurance Company (U) Ltd Vs International Air Transport Association HCCS No.667 of 2003.***

It is therefore my finding that the court cannot pronounce itself on the questions for determination before it in the absence of a proper reconciliation of accounts and establishing whether the statutory notices as provided for under Mortgage Act were served. This requires the parties to adduce have witnesses in court, lead evidence and have the said witnesses cross examined and re-examined. I therefore find that filing this suit by way of originating summons was inappropriate.

This Originating Summons is therefore dismissed with costs to the Defendants. The plaintiff may, subject to the law of limitation institute an ordinary suit before this court or any court of competent jurisdiction.

Dated, signed and delivered electronically on ECCMIS at Kampala this 13th day of November 2023.

Harriet Grace Magala

Judge