

THE REPUBLIC OF UGANDA

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

ORIGINATING SUMMONS NO. 0005 OF 2023

CAIRO BANK UGANDA :::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

- 1. JAMES VENTURES (U) LTD**
- 2. BYARUHANGA JAMES**
- 3. NDAGIRE DURUCANSI MILLY:::::::::::::::::::::::::RESPONDENTS**

Before Hon. Lady Justice Patricia Kahigi Asimwe

Judgment

Introduction

1. This matter was brought by way of originating summons under section 24(1) & (2) Mortgage Act, Regulations 12 (1) & (3) of the Mortgage Regulations & Order 37 rule (1) & rule (2) of the Civil Procedure Rules for determination of the following questions:
 - I. Whether the Plaintiff (mortgagee) is entitled to foreclose and sell the mortgaged property to recover all sums of money due in respect of the principal debt, interest, and other incidental charges.
 - II. Whether the mortgagee / Plaintiff is entitled to sell the property by private treaty under the circumstances.
 - III. Whether the Plaintiff is entitled to an order of vacant possession of the mortgaged property and developments

comprised in Kyadondo Block 214 Plot 1385 situated at Kisasi pending completion of the foreclosure process.

IV. Whether the Plaintiff should be granted the costs of this suit.

2. The Application was supported by the affidavit of Henry Kyasanku, the Recovery Manager of the Plaintiff who stated that:

- a) Sometime around 14th September 2021, the Defendant applied for and was given a loan facility of UGX 200,000,000. The loan was to be repaid within twelve (12) months with interest.
- b) The loan facility was secured by a mortgage registered over land in the names of the 2nd and 3rd Respondents. The 2nd and 3rd Respondents are directors of the 1st Defendant and also guarantors of the loan.
- c) By a subsequent Letter of Offer Ref. 1000331593/85/S/2022 dated 24th May 2022, the 1st Defendant also advanced an additional loan facility of up to UGX 200,000,000 repayable with interest of 22% per annum within a period of twelve (12) months.
- d) Shortly after the disbursement of the additional facility, the Respondents breached their loan obligations. The Bank commenced foreclosure of the security.
- e) The Respondents were served with a Notice of Default dated 20th September 2022 and subsequently a Notice of Sale on 29th November 2022 calling upon them to remedy the said default and normalize the account but to no avail.
- f) On 10th January 2023, the mortgaged property was advertised for sale by public auction vide an advert in the Daily Newspaper Paper. The said sale was frustrated by the 2nd and 3rd Respondents denying access to the Bank's appointed valuers to re-value the property. The 2nd and 3rd

Respondents refused the potential buyers to access and view the property.

- g) The 2nd Defendant is armed and has, on several instances threatened to harm whoever attempts to access the mortgaged property without his express permission.
- h) On 5th April 2023, the Plaintiff served a Notice by a mortgagee to take possession of the mortgaged property upon the Defendant as per the Mortgage Act and Regulations.
- i) The continued possession of the suit property by the Respondents has adversely affected the Banker's unfettered right of foreclosure upon default by the mortgagor.
- j) On 11th April 2023, the Respondent's indebtedness to the Bank stood at UGX 182,810,219 and of the said amount, UGX 137,291,233 is in arrears (overdue amount).
- k) The 1st Respondent's account has continued to accrue interest and penalties daily owing to the default in payment.
- l) It is in the interest of justice that the Applicant/ mortgagee takes possession of the suit property for valuation and inspection at the cost of the applicant.

3. The Defendants did not file any affidavit in reply despite being served.

Representation

4. The Plaintiff was represented by Terrain Advocates. The Respondents were not represented. Counsel for the Plaintiff submitted written submissions which court has taken into consideration.

Issues

- I. Whether the Plaintiff (mortgagee) is entitled to foreclose and sell the mortgaged property to recover all sums of money due in respect of the principal debt, interest, and other incidental charges.
- II. Whether the mortgagee/Plaintiff is entitled to sell the property by private treaty under the circumstances.
- III. Whether the Plaintiff is entitled to an order of vacant possession of the mortgaged property comprised in Kyadondo Block 214 Plot 1385 situated at Kisasi, Kampala District pending completion of the foreclosure process.
- IV. Whether the Plaintiff should be granted the costs of this suit.

Resolution

Issue One: Whether the Plaintiff (mortgagee) is entitled to foreclose and sell the mortgaged property to recover all sums of money due in respect of the principal debt, interest, and other incidental charges.

5. Order 37 Rule 4 of the Civil Procedure Rules S1 71-1 allows a mortgagee to apply for sale, foreclosure, delivery of possession by the mortgagor among other reliefs.
6. The Plaintiff submitted loan facility agreements attached as Annexure A and C to the Affidavit in support of the Application as evidence that the 1st Defendant took out a loan facility of UGX 200,000,000 in September 2021 and took out another additional loan facility of UGX 200,000,000 in May 2022. This evidence is uncontroverted.
7. The Plaintiff also attached a mortgage deed dated 21st September 2021 marked Annexure B to prove the existence of the mortgage over property comprised in Kyadondo Block 214 Plot 1385 situated at Kisasi. This evidence is also not controverted. Court notes that

under Annexure A of the 2nd loan facility agreement, the 2nd facility was also secured by the same property.

8. Under Section 18(1) a of *the Mortgage Act, No. 8 of 2009*, a mortgagor has the obligation to pay the principal sums on the day appointed or interest on the unpaid amounts. Under clause 2 of the Mortgage Deed, the mortgagor covenanted to punctually pay to the bank the mortgage debt or any sums that would be due.
9. The Plaintiff stated that the Defendants breached their loan obligations. The Defendants having failed to file any reply in effect did not deny the averment. In the case of ***Samwiri Mussa versus Rose Achen (1978) HCB, 297 cited in the case of Ayisa Nassuna & Another Versus Commissioner Land Registration Misc. Cause No. 07 of 2020***, it was held that; 'Where facts are sworn to in an affidavit and they are not denied or rebutted by the opposite party, the presumption is that such facts are accepted'. Court finds that indeed there was default in payment of the loan sums.
10. Under section 19 of the Mortgage Act where the mortgagor is in default of any obligation to pay the principal sum on demand or interest or any other periodic payment or any part of it due under any mortgage or in the fulfilment of any covenant or condition, express or implied in any mortgage, the mortgagee may serve on the mortgagor a notice in writing of the default and require the mortgagor to rectify the default within forty five working days.
11. The Plaintiff attached to the affidavit in support of the application a notice of default marked D1 issued on the 20th of September 2022 notifying the Respondents to pay UGX 193,971,323 within forty five working days. The Plaintiff attached a post office receipt showing that the documents were posted to the 1st Defendant through its address that is on the offer letters.

12. On the 28th November 2022, the Plaintiff also issued a notice of sale marked D2. The Notice shows a signature besides the name of the 3rd Defendant and the received date as 29th November 2022. In addition, the Plaintiff attached a post office receipt.
13. The Plaintiff also attached the bank statement of the 1st Defendant which shows that the Defendant is indebted to Plaintiff.
14. Under section 20(e) of the Mortgage Act, where the mortgagor is in default and does not comply with the notice served on him or her under section 19, the mortgagee has the right to sell the mortgaged property.
15. Court finds that the 1st Defendant is in default and therefore the Plaintiff is entitled to foreclose and sell the property. This issue is therefore answered in the affirmative.

Issue Two: *Whether the mortgagee/Plaintiff is entitled to sell the property by private treaty under the circumstances.*

16. Under section 27 of the Mortgage Act a mortgagee has a duty to take all reasonable steps to obtain the best price while exercising the power to sell the mortgaged land.
17. Under section 28(1) of the Mortgage Act, sell of mortgaged property shall be by public auction, unless the mortgagor consents to a sale by private treaty.
18. Under Regulation 8 of the Mortgage Regulations No. 2 of 2012, a mortgagee exercising a power of sale under the Act shall sell the mortgaged property by public auction.
19. From the above cited provisions, court finds that under the law, the preferred method of sale of mortgaged property is by public auction.

Consequently, court finds that the Plaintiff is not entitled to sell the property by private treaty. The issue is answered in the negative.

Issue Three: *Whether the Plaintiff is entitled to an order of vacant possession of the mortgaged property comprised in Kyadondo Block 214 Plot 1385 situated at Kisasi, Kampala District pending completion of the foreclosure process.*

20. Under section 24 of the Mortgage Act a mortgagee may after serving a notice of not less than five working days of his or her intention to do so, enter into possession of the whole or a part of the mortgaged land.
21. The Plaintiff adduced a notice by a mortgagee to take possession dated 5th April 2023 (Annexure F). The Plaintiff stated that the 2nd and 3rd Defendant have denied valuers access to the property. The Plaintiff further stated that the 2nd Defendant is armed and has on several occasions threatened to harm whoever attempts to access the property.
22. In the case of **Barclays Bank of Uganda versus Musimami & Anor (Originating Summons 6 of 2011)**, the Plaintiff sought an order to sell mortgaged property and vacant possession of the suit property. Justice Flavia Anglin held that since court had found that the Bank was entitled to sell the property, it followed that it was also entitled to vacant possession of the mortgaged premises.
23. This court finds that the Plaintiff is entitled to vacant possession of the property. This issue is answered in the affirmative.

Issue 4: *Whether the Plaintiff should be granted the costs of this suit.*

24. Under section 27 of the Civil Procedure Act, the costs of a suit follow the event and a successful party is entitled to costs. Having substantially answered the issues in the affirmative, the costs are granted to the Plaintiff.

25. In conclusion the Application is allowed and it is ordered as follows:

- a) The Plaintiff (mortgagee) is entitled to foreclose and sell the mortgaged property comprised in Kyadondo Block 214 Plot 1385 situated at Kisasi by public auction to recover all sums of money due in respect of the principal debt, interest, and other incidental charges.
- b) The Plaintiff is entitled to vacant possession of the mortgaged property and developments comprised in Kyadondo Block 214 Plot 1385 situated at Kisasi pending completion of the foreclosure process.
- c) The Plaintiff is granted the costs of this suit.

Dated this 30th day of January 2023


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Patricia Kahigi Asiimwe

Judge

Delivered on ECCMIS