

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

ORIGINATING SUMMONS NO. 0013 OF 2023

BETWEEN

1. MITYANA DIOCESE DEVELOPMENT TRUST

2. EQUITY BANK (U) LIMITED :::::::::::::::::::::::::::::: PLAINTIFFS

VERSUS

NAMUGENYI FLAVIA KIMBOWA :::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. LADY JUSTICE PATIENCE T.E. RUBAGUMYA

JUDGMENT

Introduction

This matter was brought by the Plaintiffs by way of Originating Summons under the provisions of **Order 37 rule 4 of the Civil Procedure Rules SI 71-1** seeking determination of the following questions:

1. Whether the Plaintiffs are entitled to delivery of vacant possession of the mortgaged property by the Defendant?
2. Whether the Plaintiffs are entitled to the costs of the suit?

Brief facts of the suit

The background of this matter is that on 10th July 2019, the 2nd Plaintiff granted the Defendant a credit facility of UGX 120,000,000 (Uganda Shillings One Hundred Twenty Million Only) which was secured by the property comprised in Leasehold Register Volume 2359, Folio 22, Plot 3,

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Land at Mityana, Singo, Bukanga Gardens. The Defendant defaulted on her loan repayment obligations and was served with notices but still failed to act upon the notice and the entire loan outstanding of UGX 130,338,402 (Uganda Shillings One Hundred Thirty Million Three Hundred Thirty-Eight
5 Thousand Four Hundred Two Only), was recalled by Notice of Sale dated 15th June 2021.

Additionally, the Defendant was also served with the final demand notice by the 2nd Plaintiff's recovery agents of CL Risk Management Services, and upon her failure to pay the outstanding sum, the property was advertised
10 and sold to the 1st Plaintiff and the land has since been transferred to the 1st Plaintiff but the Defendant has refused to vacate the land although she did not dispute the sale.

Representation

On 30th November 2023, when this matter came up for hearing, Counsel
15 Susan Nantale appeared for the 1st Plaintiff while Counsel Mulumba Rashid appeared for the 2nd Plaintiff. The Defendant did not enter a reply or make any appearance even though service was effected on her vide substituted service.

20 An affidavit of service dated 10th October 2023 by Mr. Ssebuliba Precious was filed wherein it was stated that the Defendant could not be traced. A second affidavit of service was deponed by Mr. Ssebuliba Precious dated 30th October 2023 stating that the hearing notice and originating summons were advertised in the Bukedde and Monitor Newspapers in
25 compliance with the order for substituted service issued by Court on 13th October 2023. The Defendant still did not enter any reply or make any appearance and in the premises, the Plaintiffs were granted an order to proceed ex parte.

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Counsel for the Plaintiffs were directed to file written submissions which they complied with and the same have been considered by Court in this Judgment.

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Furthermore, in this Judgment, in accordance with Section 98 of the Civil Procedure Act, Cap. 71, I have referred to the parties as “Plaintiff” and “Defendant” respectively as per the form prescribed under Form 13 of Appendix B to the Civil Procedure Rules, as opposed to reference to the parties as “Applicant” and “Respondent” as per the pleadings filed by Counsel for the Plaintiffs. I have disregarded this minor error in the interest of justice. This is in line with the Constitutional directive enacted in **Article 126 (2)(e) of the Constitution of the Republic of Uganda** that Courts should administer substantive justice without undue regard to technicalities. Rules of procedure should be used as handmaidens of justice but not to defeat it.

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Issues for Determination

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1. Whether the Plaintiffs are entitled to delivery of vacant possession of the mortgaged property by the Defendant?
2. Whether the Plaintiffs are entitled to the costs of the suit?

Plaintiffs’ submissions

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Counsel submitted that **Order 37 rule 4 of the Civil Procedure Rules as amended** permits a mortgagee to take out Originating Summons for such a relief including sale, foreclosure and delivery of possession by the mortgagor, among others while **Section 24 (2) (c) of the Mortgage Act,**

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2009 gives the Court powers to grant orders of vacant possession of the mortgaged property.

Counsel referred to the case of **Guaranty Trust Bank (U) Ltd Vs Dokwals (U) Ltd & Anor Civil Suit No.0001 of 2021 (OS)** in which **Hon. Justice Stephen Mubiru** while determining the issue of whether the Plaintiff was entitled to an order of vacant possession of the suit property, at page 6 held that;

10 *“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 Defendants’ right, title and equity of redemption to and in the mortgaged property having been foreclosed, it is ordered and*
15 *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”.*

Furthermore, that in the case of **Diamond Trust Bank (U) Ltd Vs Semakula Joseph Herman & Anor O.S No.1 of 2019**, Justice David Wangutusi stated that;

25 *“In my view all the requirements of the Mortgage Act have been fulfilled and I see no reason why I should not believe the Plaintiff”.*

Counsel stated that Court thereafter answered the question of whether the Plaintiff/mortgagee is entitled to vacant possession of the property in the affirmative.

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Counsel submitted that the Plaintiffs led evidence that all the requirements under the Mortgage Act were fulfilled and the property was sold and transferred vide a mortgage as evidenced by annexure "E" but the Defendant has refused to vacate.

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Counsel stated that according to the return of service filed on the Court record, the process server deponed that it was difficult to locate the whereabouts of the Defendant and yet she continues to derive income from the commercial building through her agents to the detriment of the 1st Plaintiff who must service the loan using the rent from the same property. Counsel stated that such conduct is an indicator that the Defendant is unwilling to vacate the property hence the need for a Court Order.

Counsel also submitted that the Defendant's rights, title and equity of redemption were foreclosed and she ought to have delivered vacant possession but adamantly refused hence the recourse to Court for an order of vacant possession to enable the 2nd Plaintiff to complete the transaction with the 1st Plaintiff (purchaser) by delivery of vacant possession.

Counsel stated that it is the Plaintiffs' evidence under paragraphs 7,8 and 9 of the affidavit in support that the Defendant was served with all relevant notices as provided under the Mortgage Act but still failed to rectify the default as seen in annexures "A", "B" and "C". Counsel submitted that the property was sold and transferred to the 1st Plaintiff as stated in paragraph 12 of the affidavit in support and evidenced by annexure "E".

It is the Deponent's testimony under paragraph 13 that after the sale of the property, the Defendant refused to vacate and that if there is any case in which the Court should not doubt granting an order of vacant

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possession, then this is it. It was stated that the mortgaged property was sold and the 2nd Plaintiff followed the due process and transferred it to the 1st Plaintiff.

5 Counsel submitted that there is no reason why the 1st Plaintiff should not enjoy possession of the property she owns and that more so, the Defendant did not challenge the sale of the said property by the Bank which would have at least given her the legal right to remain in possession of the same. Counsel submitted that the Defendant's continued possession of the
10 property is illegal and must be evicted by a Court Order to that effect.

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, their entitlement to
15 the relief being sought. (See **Sections 101-103 of the Evidence Act and Lord Denning in the case of Miller Vs Minister of Pensions (1947)2 All ER 372 at page 373**).

Issue 1: Whether the Plaintiffs are entitled to delivery of vacant possession of the mortgaged property by the Defendant?

20 I have studied the Originating Summons and the evidence therein as stated in the affidavit in support. As deduced from the facts, the 1st Plaintiff purchased land from the 2nd Plaintiff Bank. The said property was mortgaged by the Defendant who defaulted on payment of the loan which was advanced to her. The Plaintiffs now seek an order of vacant
25 possession.

Order 37 rule 4 of the Civil Procedure Rules SI 71-1 as amended provides that;

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5 “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, delivery
10 of possession by the mortgagee”.

Furthermore, **Section 29 (1) of the Mortgage Act, 2009** also provides
that;

15 “A purchaser in a sale effected by a mortgagee acquires a good
title except in a case of fraud, misrepresentation or other
dishonest conduct on the part of the mortgagee of which the
purchaser has actual or constructive notice”.

20 **Section 29 (2) (c) of the Mortgage Act, 2009** further provides that a
purchaser is not obliged to inquire whether there has been a default by
the mortgagor or whether any notice required to be given in connection
with the exercise of the power of sale has been duly given or whether the
sale is otherwise necessary, proper or regular.

25 **Section 59 of the Registration of Titles Act Cap. 230** is to the effect
that;

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“No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power”.

In the instant case, the 2nd Plaintiff through its recovery agent, CL Risk Management Services advertised the mortgaged property in the Daily Monitor Newspaper and the same was sold to the 1st Plaintiff and the property has since been transferred to the 1st Plaintiff herein. A copy of the land title was attached in evidence as annexure “E”. However, the Defendant has refused to vacate the premises.

The lengthy judicial 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.

I have looked at the copy of the said certificate of title. The land comprised in Leasehold Register Volume 2359 Folio 22 Plot 3 land at Bakunga Gardens, Mityana (suit land) was registered in the name of Mityana Diocese Development Trust on 5th January 2023 at 3:20pm under instrument No. MIT. 00013941. According to the evidence adduced, the said land does not have any encumbrance lodged by the Defendant neither

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did the Defendant nor her representative appear in Court to contest the entry on the certificate of title.

In the circumstances, given the above facts, evidence and the law, I am
5 convinced that the 1st Plaintiff is the registered proprietor of the suit land and is entitled to ownership and quiet possession of the same. The 1st Plaintiff is entitled to an order of vacant possession of the suit land.

Issue 2: Whether the Plaintiffs are entitled to the costs of the suit?

10 As to whether the Plaintiffs should be granted the costs of the suit, it is provided under **Section 27 (2) of the Civil Procedure Act, Cap. 71** that costs follow the event unless there is a good reason for the Court to direct otherwise. Further in the case of ***Uganda Development Bank Vs Muganga Construction Co. Ltd (1981) H.C.B 35, Justice Manyindo*** (as
15 he then was) held that:

“A successful party can only be denied costs if its proved, that but for his 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”.

20 The Plaintiffs being the successful parties in this case are therefore entitled to costs of this suit.

Accordingly, Judgment is entered in favour of the Plaintiffs with the following orders:

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1. The Defendant is hereby ordered to deliver to the Plaintiffs vacant possession of the mortgaged land.
 2. Costs of the suit are awarded to the Plaintiffs.

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I so order.

Dated, signed and delivered electronically this **11th** day of **December**,
2023.

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Patience T. E. Rubagumya

JUDGE

11/12/2023

7:45am