

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

**ORIGINATING SUMMONS NO. 0001 OF 2024**

**IN THE MATTER OF MORTGAGED PROPERTY COMPRISED IN FRV 349 FOLIO  
12 PLOT 47 & FRV 349 FOLIO 7 PLOT 49, KANJOKYA STREET, KAMPALA**

**AND**

**IN THE MATTER OF A LEGAL MORTGAGE IN FAVOUR OF BANK OF INDIA  
(UGANDA) LIMITED**

**ALPS INVESTMENTS LIMITED ::::::::::::::::::::::::::: PLAINTIFF/MORTGAGOR**

**VERSUS**

**BANK OF INDIA (UGANDA) LIMITED ::::::::::::::::::::::::::: DEFENDANT/MORTGAGEE**

**(Before: Hon. Justice Patricia Mutesi)**

**JUDGMENT**

**Background**

1. This suit is brought under **Sections 25(1)(a), 26(2) and 27 of the Mortgage Act, 2009, Section 98 of the Civil Procedure Act Cap 71, Regulations 11, 22, 25 and 26 of the Mortgage Regulations, 2012 and Order 37 Rules 4 and 6 of the Civil Procedure Rules S.I. 71-1** seeking answers to the following questions:
  1. Whether the defendant's forceful taking of possession of the mortgaged property on 14<sup>th</sup> December 2023 without issuance and service to the plaintiff of a notice of entry was irregular and illegal.
  2. Whether the foreclosure on the mortgaged property without a notice to sell and a valuation report is irregular and illegal, and should be set aside.
  3. Whether the plaintiff should be granted general damages and costs of the suit.
2. The plaintiff prayed for the following reliefs:

1. An order that the defendant forthwith, and in any event within seven (7) days from the date of the order, deliver to the plaintiff vacant possession of its property comprised FRV 349 Folio 12 Plot 47 & FRV 349 Folio 7 Plot 49, Kanjokya Street, Kampala.
2. An order that the defendant deposits the titles of the mortgaged property comprised in FRV 349 Folio 12 Plot 47 & FRV 349 Folio 7 Plot 49, Kanjokya Street, Kampala, together with the releases of the mortgages, within seven (7) days of the plaintiff depositing the balance of USD 333,559.55 in Court, the plaintiff having paid a total of USD 1,050,000 from the outstanding balance of USD 1,383,559.55.
3. An order for general damages and costs in favour of the plaintiff.
3. This suit is supported by the affidavit of Maganti Ravindranath Chowdhary, a director in the plaintiff. He told the Court that the plaintiff obtained a credit facility of USD 1,300,000 from the defendant in 2018 upon the security of mortgages over the property comprised in FRV 349 Folio 12 and FRV 349 Folio 7 Plot 49, Kanjokya Street, Kampala. He stated that due to the disruptions of COVID, the plaintiff had challenges in challenges in repaying the loan. The defendant eventually classified the loan as “non-performing” in November 2022 with an outstanding balance of USD 1,383,559.55.
4. Mr. Ravindranath further informed the Court that in 2023, the plaintiff and the defendant were sued by Geetha Kakade Nandeshwar Mahendrakar and Chakdradhar vide Civil Suit No. 204 of 2023 (“the main suit”) over the mortgaged property. On 11<sup>th</sup> September 2023, this Court issued an injunction in Misc. Application No. 329 of 2023 restraining any dealings in the mortgage property until the disposal of the main suit. He confirmed that the defendant has since paid USD 1,383,559.55, fully settling the loan debt. He stated that on 14<sup>th</sup> December 2023, the defendant forcefully took possession of the mortgaged property and that the plaintiff later learnt that the defendant had purported to sell the property in November 2023.
5. The defendant opposed the application through an affidavit in reply sworn by Paul Ndayisenga, its Head of Credit. He confirmed that this Court

issued a conditional temporary injunction in Misc. Application No. 329 of 2023 stopping the defendant from selling the mortgaged property but that the plaintiff failed to satisfy the condition precedent to that injunction which was to deposit 30% of the outstanding amount of the loan within 1 month from the date of the injunction. He stated that this breach allowed the defendant to sell the mortgaged property and rendered the issuance of a notice to sell unnecessary. He averred that the sale conducted was beyond reproach.

6. Mr. Ndayisenga clarified that all the defendant's attempts to get access to the premises for purposes of valuation and inspection were frustrated by the plaintiff. Finally, Mr. Ndayisenga stated that the plaintiff did not object to the sale process at any one point and that if this application is allowed, the defendant is likely to suffer greatly since it will be exposed to a law suit by the successful bidder who has already committed by depositing the required 30% at the fall of the hammer.
7. The defendant also filed a supplementary affidavit in reply sworn by Gheno Charles, an auctioneer trading as Mera Associates Ltd. Mr. Gheno told Court that he was appointed by the defendant to auction the mortgaged property. He ran an advert in the Daily Monitor informing the general public of the intended sale of the suit property by public auction. He received 5 sealed bids which were later opened and K. Jassani emerged as the highest bidder with USD 2,400,000. K. Jassani then deposited 30% of the said amount and is ready to deposit the remaining 70% once this Court settles the present suit. Mr. Gheno, therefore, confirmed that the defendant has already sold the mortgaged property.

### **Issues arising**

8. The following issues have arisen for the Court's determination:
  1. Whether the defendant's forceful taking of possession of the mortgaged property on 14<sup>th</sup> December 2023 without issuance and service to the mortgagor of a notice of entry was irregular and illegal.
  2. Whether the foreclosure on the mortgaged property without a notice to sell and a valuation report is irregular and illegal and should be set aside.

3. Whether the plaintiff should be granted general damages and costs of the suit.

### **Representation and hearing**

9. At the hearing, the plaintiff was represented by Mr. Francis Gimara (SC) and Mr. Edson Babalanda of M/S ALP Advocates while the defendant was represented by Mr. Busingye Michael of M/S Kiiza & Kwanza Advocates. Counsel filed written submissions which I have fully considered, along with all the materials on record and the laws and authorities cited.

### **Determination of the issues**

**Issue 1: Whether the defendant's forceful taking of possession of the mortgaged property on 14<sup>th</sup> December 2023 without issuance and service to the mortgagor of a notice of entry was irregular and illegal.**

10. Taking possession of mortgaged property and sale of mortgaged property are two distinct reliefs available to an unpaid mortgagee under the Mortgage Act, 2009. Pursuant to **Section 24 of the Mortgage Act**, an unpaid mortgagee may, after the issuance of a notice of entry of not less than 5 working days of his or her intention to do so, enter into possession of the whole or part of the mortgaged property, take all profits therefrom and apply the same to the satisfaction of the mortgage debt. On the other hand, pursuant to **Section 26 of the Mortgage Act**, an unpaid mortgagee may, after 21 working days following the service of a notice to sell upon the mortgagor, sell the mortgaged property and apply the proceeds from that sale to settle the mortgage debt.
11. However, the Mortgage Regulations anticipate that the 2 reliefs could slightly overlap. This is foreseen in **Regulation 12(3) of the Mortgage Regulations, 2012** which allows an unpaid mortgagee who wants to value the mortgaged land in anticipation of selling it, but who has been denied access to the land by the mortgagor, to take possession of it for purposes of valuing it and for inspections by potential buyers. Therefore, a mortgagee may rightly take possession of the mortgaged land in order to draw the profits therefrom to satisfy the mortgage debt pursuant to Section 24 of the Mortgage Act or for the purpose of valuation and

inspections in anticipation of selling it to satisfy the mortgage debt pursuant to Section 26 of the Mortgage Act.

12. Regulation 12(3) of the Mortgage Regulations does not set out the procedure to be followed by a mortgagee who takes possession for the purpose of valuation and inspections. In my considered view, the procedure to be followed in such instances is that which is analogous to the one prescribed by Section 24 of the Mortgage Act. The mortgagee must still serve a notice of entry upon the mortgagor for at least 5 working days before taking such possession.
13. In paragraphs 13 and 17 of the affidavit in reply, the defendant's Head of Credit stated that the plaintiff was in the habit of not receiving court process or any other correspondence and that after a failed attempt to serve them on 16<sup>th</sup> October 2023, the notice of entry was served on them through their lawyers' postal address. I have examined this notice and it clearly states that the defendant took possession of the mortgaged property pursuant to Section 24 of the Mortgage Act. It appears that there was some animosity between the plaintiff and the defendant rendering it impossible for the defendant to serve relevant notices and correspondence regarding the recovery on the plaintiff personally. Having reviewed the notice of entry and the postal receipt, I am satisfied that the defendant served a notice of entry on the plaintiff through its lawyers on 18<sup>th</sup> October 2023 before taking possession of the mortgaged property on 14<sup>th</sup> December 2023.
14. Furthermore, the plaintiff seems to be under the misconception that a mortgagee cannot use force to enter and take possession of mortgaged property. **Section 24(2)(a) of the Mortgage Act** further anticipates a situation in which the mortgagor remains noncompliant with the mortgagee's intended entry into possession. It prescribes that a mortgagee may exercise the power of entering into possession of the mortgaged land by entering into and taking possession of the land or a part of it during the day time using only such force as shall be reasonable in the circumstances. Where a mortgagor adamantly refuses to allow the mortgagee to take possession, the mortgagee is allowed to use some reasonable force to take possession. Cases of excessive use of force can



always be reported as criminal complaints to the Police or to courts of law as civil suits to ensure that they are fully investigated and punished.

15. As this Court will note later in Issue 3, while the plaintiff has alleged that the defendant's use of force was excessive and illegal, that claim cannot be investigated in this kind of application because it necessitates calling and reviewing evidence from both parties regarding the defendant's entry into possession of the mortgaged property. In the circumstances, the Court can only pronounce itself on the issuance of the notice of entry and the rule that, in principal, a mortgagee is allowed to use reasonable force to take possession of mortgaged property. This issue is, therefore, answered in the negative.

**Issue 2: Whether the foreclosure on the mortgaged property without a notice to sell and a valuation report is irregular and illegal and should be set aside.**

16. The rights of a mortgagee upon a mortgagor's default are not absolute. They are caveated by the duty to exercise care. Even when a mortgagee is entitled to exercise his or her rights under the Mortgage Act, 2009, there are still strict rules and parameters within which those rights are to be exercised. In **Afro Moto Ltd & 2 Ors v Barclays Bank Uganda Ltd, HCCS No. 189 of 2010**, this Court set down some general guidelines for the sale of mortgaged property by an unpaid mortgagee:

*"... It is now the statutory duty that despite the right of a mortgagee to sell the mortgaged property in recovery of the debt owned by the mortgagor, it owes a duty of care to do the following:*

- 1. The first rule is not to act in secret. The mortgagee should also obtain the best price and not act in bad faith.*
- 2. Value the property before sale to establish the current market and forced sale value, obtain the best price and not to sell the secured property under forced sale and undervalue price.*
- 3. Property before sale should be advertised after the mortgagor has been notified.*

***4. Method of sale. Public auction is competitive and more transparent and if private treaty is used, the best price and involvement of the mortgagor is preferable especially access to information ..."***

17. Aware of the above principles, I will now resolve the concerns raised by the plaintiff about the sale of the mortgaged property in the present case. The plaintiff has alleged that the defendant sold the mortgaged property without serving a notice to sell upon the plaintiff and without conducting a valuation of the property.

18. **Section 26(2) of the Mortgage Act, 2009** provides that:

***"Before exercising the power to sell the mortgaged land, the mortgagee shall serve a notice to sell in the prescribed form on the mortgagor and shall not proceed to complete any contract for the sale of the mortgaged land until twenty-one days have lapsed from the date of the service of the notice to sell."*** Emphasis mine.

19. The obligation to issue a notice to sell before sale is mandatory. A notice to sell furthers the mortgagor's equity of redemption by alerting him or her about the mortgagee's decision to sell and according him or her another opportunity to redeem the mortgaged property. For the mortgagor, it is the notice to sell that crystallises the possibility of permanently losing his or her property. The notice of default issued under Section 19 of the Mortgage Act informs the mortgagor that he or she is in default, but it is the subsequent notice to sell that clearly sets out the possible repercussion/ramification of that default.

20. In the present case, the defendant admittedly only issued a notice of default to the plaintiff in December 2022. In paragraph 22 of the affidavit in reply, the defendant claimed that it did not issue a notice to sell to the plaintiff because the notice to sell had been over-taken by events given that the plaintiff was party to Misc. Application No. 329 of 2023 which gave a self-executing order to sale upon default in depositing the 30%. In my considered view, this argument holds no merit. I reiterate that Section 26(2) of Mortgage Act is mandatory and must be complied with at all times at all times.

21. **Misc. Application No. 329 of 2023** was an application for a temporary injunction stopping dealings in the mortgaged property before the final disposal of the main suit vide Civil Suit No. 204 of 2023. In that application, this Court issued the temporary injunction on condition that 30% of the outstanding amount on the loan is deposited with the defendant within 30 days from the date of the ruling. That deposit was not made and the 30 days lapsed. The defendant's characterisation of the order of this Court in that application as a ***"self-executing order to sale upon default in depositing the 30%"*** is misconceived. The failure to deposit the 30% simply meant that the defendant could then proceed to exercise its rights against the plaintiff in accordance with the relevant law. That failure did not mean that the defendant can disobey and ignore the express statutory procedure under which it could exercise its rights against the plaintiff.
22. I am convinced that if the defendant had issued a notice to sell to the defendant, there is a possibility that the plaintiff could have done more to redeem its property before the sale, like taking out additional credit from another financial institution, in the desperation of wanting to redeem its property. Refusing to issue a notice to sell and then ambushing the plaintiff with the news of the sale is tantamount to circumventing and defeating the plaintiff's equity of redemption.
23. Additionally, **Regulation 11 of the Mortgage Regulations, 2012** provides:
- "11. Valuation of mortgaged property***
- (1) The mortgagee shall, before selling the property, value the property to ascertain the current market value and the forced sale value of the property.***
- (2) For the purposes of sub regulation (1), the valuation report shall not be made more than six months before the date of sale ..."*** Emphasis mine.
24. The above regulation is also compulsory. Before the mortgagee can sell mortgaged land, he or she must always conduct a valuation of the land within the 6 months preceding the sale. This rule is rooted in the need to further protect the mortgagor by ensuring that the mortgaged land is not



sold at an undervalue to his or her detriment. Without such a valuation, the mortgagee and its agents would be left to gamble about the true value of the mortgaged property, or to deliberately undervalue it in order to cheat the mortgagor.

25. In the present case, the defendant reasoned that it was unable to value the land before selling it because the plaintiff became belligerent and refused the defendant's agents access to the mortgaged property for valuation purposes. I must note that, from my findings in Issue 1 above, there appears to be some truth to this claim. This is also confirmed by paragraph 18 and Annexure D to the affidavit in reply which both show that the defendant made several requests to the plaintiff for access to mortgaged property but all in vain.
26. However, I reiterate that any sale of mortgaged land without a valuation of the same being conducted within 6 months before that sale is void. There is nothing that can justify the sale of mortgaged property without such a valuation. The defendant ought to have waited to sell the mortgaged property until after the valuation. The correct procedure was that the defendant ought to have taken possession of the land, valued it and then sold it off.
27. Today, almost 15 years after the Mortgage Act came into force, it is unthinkable that a mortgagee can ever seek to justify the omission to issue a notice to sell and to value mortgaged property before selling it. These two aspects are some of the key cornerstones of the sale of mortgaged property by an unpaid mortgagee in the law. Accordingly, this issue is answered in the affirmative.

**Issue 3: Whether the mortgagor should be granted general damages and costs of the suit.**

28. In Issue 2, I have found that the foreclosure on the mortgaged property without a notice to sell and a valuation report was irregular and illegal. Consequently, the applicant is entitled to an order setting aside the foreclosure. The mortgagor is also entitled to the restoration of its possession of the property forthwith. Relatedly, the defendant should provide to the plaintiff a formal account of its possession of the

mortgaged property from 14<sup>th</sup> December 2023 until the date when the plaintiff's possession is restored.

29. I am hesitant to order the mortgagee to release the mortgages over the mortgaged property and to return the duplicate certificates of title for the mortgaged property to the mortgagor at this point. As the mortgagee's Head of Credit stated in the affidavit in reply, the outstanding loan balance of USD 1,383,559.55 was as of December 2022. Unfortunately, the mortgagee has never issued any other demand showing an updated loan balance since then.
30. However, since the plaintiff admittedly only repaid the full USD 1,383,559.55 between October 2023 and January 2024, it is possible that some additional interest could have accrued on the outstanding loan balance from December 2022 until January 2024. I deem it fair and just to allow the mortgagee another opportunity to present and prove any other claim it has against the mortgagor, whether in a subsequent application, or in Civil Suit No. 204 of 2023 or otherwise, before the mortgages can be released.
31. I find the mortgagor's prayer on general damages to be misplaced. It is trite law 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, and not to enable court to determine matters which involve a serious and complex question necessitating the presentation and review of evidence at trial. (See **Mayanja Bosco Kasikururu Lois Okumu & Anor, HC Originating Summons No. 5 of 2008** and **Nesta Petroleum (U) Ltd v Silcon Oil Ltd & Anor, HC Originating Summons No. 3 of 2022.**)
32. General damages are "damages at large", meaning that their award is not limited to the actual pecuniary loss that can be specifically proved (See **Gloria Kubajo & Anor v Francis Drate, High Court Civil Suit No. 0889 of 2020**). In assessing general damages, the Court must take all the relevant circumstances into account and reach an intuitive assessment of the loss which it considers a claimant to have sustained. Evidence has to be called, usually at a trial, to prove general damages in order to assist the Court to reach that intuitive assessment. It is unlikely that a proper assessment of

general damages can be reached in a suit brought by originating summons. Originating summons are intended for matters that are not controversial in terms of evidence. An ideal originating summons must primarily present matters of law and must not involve a substantial contest over facts (See **Guarantee Trust Bank (Uganda) Ltd v Dokwals Uganda Limited & Anor, HCCS No. 0001 of 2021**).

33. Under Section 27(1) of the Civil Procedure Act Cap 71, costs are awarded at the discretion of court. In subsection (2) thereof, costs follow the event, unless for some reasons court directs otherwise. It is also trite law that a successful party can only be denied costs if it is proved that, but for his or her conduct, the litigation could have been avoided (see **Uganda Development Bank v Muganga Construction [1981] HCB 35**). In the present application, I have not found any special reason to justify denying the applicant the costs of this application. The costs of this suit shall follow the event.
34. Additionally, it is unclear to me why the defendant has not complied with the plaintiff's requests for its loan account statement. Among the services a banker is habitually required to provide is the issuance of a bank statement to its customer as and when the customer requests for it. I would have thought a banker, desiring to achieve full recovery of the principal and interest on a non-performing loan, would be very eager to appraise the borrower of the outstanding loan balance to enable the borrower make full repayment.
35. It is only just that the plaintiff is availed with its loan account statement and a demand letter, if necessary, raising any and all outstanding amounts under the loan. This will enable the plaintiff to know and settle its obligations to the defendant fully. I should also clarify that, save for the costs incurred in the issuance and service of the notice of default in December 2022, the defendant is not entitled to recover any other costs of recovery from the sale. Since the sale has been found to have been illegal, the defendant shall not be allowed to benefit from its illegal actions in any way.
36. Consequently, this application is allowed in substantial part with the following orders:

- i. The defendant's entry into possession of the mortgaged property on 14<sup>th</sup> December 2023 without issuance and service to the plaintiff of a notice of entry was irregular and illegal.
- ii. The foreclosure on the mortgaged property without a notice to sell and a valuation report was irregular and illegal, and is hereby be set aside.
- iii. The mortgagee shall, within 30 (thirty) days from the date of this ruling, deliver vacant possession of the mortgaged property comprised in FRV 349 Folio 12 Plot 47, Kanjokya Street, Kampala and FRV Folio 7 Plot 49, Kanjokya Street, Kampala to the mortgagor, along with a formal account of the defendant's possession thereof.
- iv. The defendant shall, within 7 (seven) days from the date of this ruling, avail to the plaintiff its updated loan account statement and a demand letter, if necessary, raising any and all outstanding monies under the loan.
- v. Costs of this application are awarded to the plaintiff.



**Hon. Justice Patricia Mutesi**

**JUDGE**

**(22/01/2024)**