THE REPUBLIC OF UGANDA

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

MISCELLANEOUS CAUSE NO. 0008 OF 2023

STANDARD CHARTERED BANK UGANDA LIMITED :::::::::::::::: APPLICANT

VERSUS

ANDREW OKELLO LAWOKO :: RESPONDENT

(Before: Hon. Justice Patricia Mutesi)

RULING

Background

The applicant brought this application under Section 24 of the Mortgage Act, 2009, Section 33 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act Cap 71, and Order 52 rules 1 and 3 of the Civil Procedure Rules S.I. 71-1 seeking an order for vacant possession, possession and/or for eviction be issued against the respondent for the property comprised in **KCCA 15 Folio 19 Block A Unit No. 3 Condominium Plan 0109, Plot 13 Peninsula Close, Nakawa Division, Kampala** (hereinafter "the mortgaged property"). The applicant is also seeking for costs of the application to be provided for.

Briefly, the grounds of this application are that:

1. In August 2015, the applicant advanced a credit facility of USD 150,000 to the respondent. The facility was secured by, among others, a mortgage over the mortgaged property.
2. Despite fully utilising the facility, the respondent defaulted on his loan repayment obligations to the applicant.
3. The applicant has since issued and served the requisite notice of default and notice to sell on the respondent.
4. In spite of the said notices and constant reminders to the respondent to fulfil his loan repayment obligations, the respondent has still failed to honour his repayment obligations to the applicant and remains in default.
5. The applicant has also since issued a notice to take possession which the respondent continues to ignore. The respondent is still in possession of the mortgaged property that is the subject of sale.

6. The applicant cannot sell, value or deal with the mortgaged property without having possession of the properties.
7. It is in the interests of justice that this application is allowed.

The application is supported by the affidavit of Ms. Rose Tamale, the applicants Collections Team Leader, Credit Risk Management – Consumer, Private and Business Banking. She stated that in July 2015, the respondent applied for and was advanced a loan of USD 150,000 under specified terms and conditions which he expressly agreed to. The facility was to be repaid in equal monthly instalments of USD 1,713 and it was secured by a legal mortgage over the mortgaged property. She confirmed that the applicant disbursed the facility to the respondent and that the respondent fully utilised it.

Ms. Tamale further stated that the respondent failed to comply with the loan repayment schedule despite several reminders. She stated that, accordingly, on 22nd June 2022, the applicant issued a notice of default to the respondent advising him that the applicant would enter into possession of the mortgaged property if he did not rectify his default within 45 days thereafter. She stated that the respondent failed to comply with the notice of default and the applicant served him with a notice to sell and a notice to enter possession. She confirmed that although the respondent remains indebted to the applicant to the tune of USD 94,972, the respondent and his agents have become belligerent and they have blocked the applicant from accessing the mortgaged property, rendering it impossible to carry out the mandatory revaluation of the mortgaged property and for potential buyers to inspect the property.

The respondent filed an affidavit in reply opposing the application. He denied the claims that he deliberately refused to pay the applicant and that he failed to fulfil his facility obligations. He indicated that he has been financially constrained for the last 2 years which were characterised with effects of lock down due to the COVID-19 pandemic and the resultant economic effects. He stated that despite the said circumstances, he has always tried his level best to comply with the terms of the facility and that, on the occasions when he has not complied, he would subsequently make right the shortfall.

The respondent stated that even before he was served with court documents in this matter, he had already tried to comply with the notice of default by making some additional deposits in further repayment of the loan and that his loan

statement now reflects that he has a positive balance with the applicant. He maintained that he is still committed to perform his obligations as per the loan agreement which is why he could not adhere to the notice to enter possession. For those reasons, he contended that it is just and equitable that the Court declines to grant this application.

Representation and hearing

At the hearing of this application, the applicant was represented by Mr. Pius Kitamirike of M/S S&L Advocates while the respondent was represented by Mr. Robinson Wamanyi of M/S Kasumba, Kugonza & Co. Advocates. The applicant's counsel filed submissions as directed by court. I have carefully considered all the materials on record, the submissions of the applicant's counsel including the laws and authorities cited.

Issues arising

1. Whether the affidavit in reply is properly before the Court.
2. Whether the applicant is entitled to the reliefs sought.

Determination of Issues

Issue 1: Whether the affidavit in reply is properly before the Court.

In his written submissions, counsel for the applicant raised a point of law to the effect that the respondent had failed to file an affidavit in reply despite being served with the application. Relying on the case of **Ayisa Nassuna & Anor v Commissioner Land Registration, Miscellaneous Cause No. 07 of 2020**, counsel submitted that the respondent is be deemed to have admitted the application.

I have examined the court record in the present application and recalled that when counsel for the applicant appeared before me on 15th May 2023, I issued directions for the further management of the case. The applicant, who had not yet served the application on the respondent at that point, was instructed to immediately serve it on the same day. The respondent was to file and serve his affidavit in reply on or by 22nd May 2023 and the applicant would then file and serve its affidavit in rejoinder (if any) along with its written submissions on or by 26th May 2023. The respondent was directed to file his written submissions in reply on or by 2nd June 2023 and, finally, the applicant would file its submissions

in rejoinder (if any) on or by 7th June 2023. I also instructed the applicant to formally write to the respondent notifying him about these directions.

The applicant filed an affidavit of service on 14th June 2023 notifying Court that it had experienced challenges in serving the respondent personally within the time prescribed by Court, but that he had been served with the application and the details of the Court's directions by email on 24th May 2023 and by Whatsapp on 29th May 2023. The affidavit confirmed that the respondent acknowledged receipt of the application and details on Whatsapp. On his part, the respondent conceded in paragraph 4(c) of his affidavit in reply that he was served with the application on 25th May 2023. He then filed his affidavit in reply on Court record on 13th June 2023.

While it is not true that the respondent did not file an affidavit in reply opposing the application as alleged by counsel for the applicant, it appears that that the respondent filed his affidavit in reply outside the time prescribed by the Court and by the Rules. The Court had directed that the affidavit in reply is filed on or by 22nd May 2023. The respondent can be excused for failing to comply with that timeline since he had not yet been served with the application by 22nd May 2023. However, even when the respondent was served with the application on 25th May 2023, he filed his affidavit in reply on 13th June 2023 which was 19 days after the date he admits to have been served.

It is trite law that the timelines that apply to the filing of a plaint and a written statement of defence also apply to the filing of applications, affidavits in reply and affidavits in rejoinder (See **Stop and See (U) Ltd v Tropical Africa Bank, HCMA No. 333 of 2010**. A reply to an application must be filed within 15 days from the date of service of the application. Failure to file that affidavit in reply within 15 days puts the reply out of the time prescribed by the rules. Once a party is out of time, he or she ought to seek leave of court to file the affidavit in reply outside the prescribed time (See **The Ramgarhia Sikh Society & 2 Ors v The Ramgarhia Sikh Education Society Ltd & 8 Ors, HCMA No. 325 of 2015).**

The Court retains the discretion to reject or excuse late filing of documents on its record. In ***Stop and See***, a reply which had been filed 6 months late was rejected. In ***Ramgarhia Sikh Society***, a reply had been filed one month late and the Court allowed it. In the present case, the respondent filed his affidavit in reply 4 days late. Although the respondent has not formally sought leave of

court to validate his late filing, I am inclined to excuse him in order to deal with the substantive issues in this matter in line with Article 126(2)(e) of the Constitution of the Republic of Uganda, 1995 (amended). Therefore, the Court hereby validates the respondent's late filing of his affidavit in reply and finds that the affidavit in reply is properly before the Court.

Issue 2: Whether the applicant is entitled to the reliefs sought.

The uncontested evidence of the applicant is that in August 2015, the applicant advanced a credit facility of USD 150,000 to the respondent. The respondent fully utilised this facility after disbursement. However, the respondent's repayment has been inconsistent despite his agreement to a clear loan schedule in which he was to repay the facility and interest thereon through equal monthly instalments of USD 1,713 from 30th August 2015 until 30th September 2028.

As counsel for the applicant correctly submitted, Clause 10 of the General Terms and Conditions attached as Annex A to the facility letter defines the instances in which an event of default occurs. In relevant part, the Clause provides that:

> ***"10) EVENTS OF DEFAULT***
>
> *Each of the events or circumstances set out in this clause 10 is an Event of Default.*
>
> ***10.1 Non Payment***
>
> ***The Borrower fails to pay on the date indicated in any written demand from the Bank any amount payable by it pursuant to the Loan Documents.*** *Provided that a copy of such demand shall be delivered to the Chargor(s)."*

Additionally, Clause 11.1 of the said General Terms and Conditions provides that the security for the loan shall become immediately enforceable if an event of default has occurred and, while such event is continuing, the Bank notifies the Borrower in writing of the occurrence of that event of default or takes any of the steps it is entitled to take by reason of the occurrence of such event of default. Clause 11.2 allows the applicant to then exercise any of the rights of an unpaid mortgagee under the law.

Having considered all the evidence adduced, I am satisfied that several events of default occurred in the present dispute entitling the applicant to have recourse to the security. I note from para. 4(a) of the affidavit in reply that the respondent admits to failure to pay some instalments as and when they fell due but he only attempts to explain that default away. The applicant issued a notice of default to the respondent dated 23rd February 2021 requiring him to pay the entire outstanding balance of USD 116,574 within 45 days which were to expire on 30th April 2021. The respondent did not comply. On 10th June 2022, the applicant sent another notice of default to the respondent claiming the balance of USD 102,989 but the respondent still did not comply. On 7th December 2022, the applicant sent a notice to take possession of the mortgaged property to the respondent claiming the outstanding balance of USD 97,816 but all in vain.

From the respondent's loan account statement which is annexed as Annexure A to the affidavit in reply, the respondent repaid a total of USD 15,537 between 21st December 2022 and 12th June 2023. Unfortunately, the applicant omitted to file an affidavit in rejoinder to the affidavit in reply to present an updated loan balance. This would have helped the Court to know the outstanding loan balance at the time the application was heard. It is clear that the respondent no longer makes regular instalment payments as agreed in the facility agreement. Although the loan balance appears to continuously reduce, the respondent's payments remain irregular both in terms of when they are made and their quantum. In the meantime, the respondent has denied the applicant's agents access to the mortgaged property for valuation and inspection purposes.

In para. 6 of the affidavit in reply, the respondent reiterated his commitment to fully settle his loan obligations. In paragraph 4(a) of the same affidavit in reply, the respondent explained that his non-compliance with the loan obligations was not deliberate and that it was caused by financial constraints brought about by the economic crisis that followed the COVID-19 pandemic lockdowns. While I appreciate those constraints, I am doubtful whether the respondent's conduct is the proper reaction he ought to have made to manage his relationship with the applicant. It should be noted, from the on-set, that the respondent did not explain to the Court how, in specific terms, the COVID-19 pandemic affected his particular source(s) of income.

On several occasions, this Court has dealt with cases in which loan repayment was rendered cumbersome by the effects of the COVID-19 pandemic. For instance, in **Jackson Kabikire Mubangizi v Housing Finance Bank, HCMA No. 961 of 2020**, this Court took judicial notice of the adverse impact of the COVID-19 pandemic on businesses in Uganda. The Court guided that when taking into consideration the impact of the COVID-19 pandemic on contractual obligations, each case must be considered on its unique merits. The Court then went ahead to reject the applicant's claim in that case that the COVID-19 pandemic had rendered it impossible to perform his loan repayment obligations.

I am alive to the fact that on 14th April 2020, the Bank of Uganda issued the **Guidelines on Credit Relief and Loan Restructuring Measures for Supervised Financial Institutions (SFIs) During the COVID-19 Pandemic** to all Chief Executive Officers of commercial banks in Uganda like the applicant. Under Guideline No. 1(a) thereof, the Bank of Uganda directed that in the 12-month period starting 1st April 2020, a maximum of 2 loan restructurings was to be allowed for any credit facility, irrespective of the number of times it had been restructured before then. These Guidelines, in my view, gave liberty to all persons who had running loan obligations with commercial banks at the time, like the respondent, to request their banks for loan restructurings. The respondent did not adduce evidence of any formal request for such loan restructuring.

Furthermore, in **Fenghua Limited v Modena MN Group Construction (U) Limited & Ors, HCCS No. 0735 of 2022**, this Court handled a dispute over a contract in which the defaulting party, in defence of a claim for breach of contract, argued that it had been unable to perform its obligations due to challenges in accessing the requisite logistics. In dealing with that argument, the Court held that:

> ***"… It is trite law that contractual obligations may be modified from time to time to deal with changes in circumstances so as to effectuate the greater purpose of a contract. A party who fails or neglects to reach out to his or her contractual counterpart to negotiate a modification of the terms, in circumstances where performance of those terms becomes cumbersome, remains liable under those terms. To allow such a party to***

unilaterally wriggle out of the ramifications for breach of those terms would defeat the legal implications and purpose of the contract …"

In the ***Fenghua*** decision, this Court therefore recommended that parties who enter into a contract only to find that the performance of their obligations is not as easy as they thought should jointly consult and discuss whether and how to modify those obligations. During performance, contractual counterparts should continue to share information about any and all challenges they may experience so that they can devise joint solutions to them. Except for the instance of frustration, a party to a contract should never relieve itself or modify its obligations without his or her counterpart's consent. This position reinforces **Section 67 of the Contracts Act, 2010** which anticipates that parties to a contract may vary any of their rights, duties or liabilities by express agreement, course of dealing or a usage or custom binding upon all of them.

In the present facts, the proper course of action that the respondent ought to have taken was to engage the applicant for a re-negotiation of the payment terms in response to the economic crisis following the COVID-19 pandemic. He appears to have unilaterally decided to make irregular loan repayments as and when he gets money and to deliberately refuse to allow the applicant's agents access to the mortgaged property for valuation and inspection purposes. The applicant is now never aware of when the next payment will come in and how much it will be. The applicant is also not aware if and when it will ever have recourse to the security for the loan in order to recover the outstanding balance.

I am in full agreement with the submissions and authorities of the applicant regarding the need for an unpaid mortgagee to have recourse to the security in order to recover the unpaid loan balance. As this Court found in **Steel Rolling Mills Ltd & 2 Ors v Standard Chartered Bank (U) Ltd, HCMA No. 829 of 2015**, the very essence of pledging property as security is to hand it over to the bank in the event of default so that the bank can secure its money by either managing the property through taking possession thereof and collecting rent, leasing the property or through sale. By subjecting properties to a mortgage, a borrower intends that the property should be used by the creditor to recover the debt in case of default (See **Herbert Kabunga Traders v Stanbic Bank (U) Ltd, HCMA No. 159 of 2012**).

Once the mortgage obligations are breached and the requisite notices are issued, the mortgagee is entitled to enter into possession of the mortgaged property (See **Uganda Development Bank Ltd v Ringa Enterprises Co. Ltd & Anor, HCMA No. 0012 of 2015**). In the present case, I have found that the respondent has severally breached his mortgage obligations by failing to pay several instalments of the loan secured by the mortgage as and when they fell due. The applicant has since recalled the entire loan and issued to him 2 notices of default and a notice of entry into possession, but the respondent has still not repaid the loan in full. Since the applicant has ignored the notice of entry into possession, this Court must now intervene.

Consequently, this application is allowed and I make the following orders:

i. An order for vacant possession and, in default thereof, eviction doth issue against the respondent in favour of the applicant in respect of the property comprised in **KCCA 15 Folio 19 Block A Unit No. 3 Condominium Plan 0109, Plot 13 Peninsula Close, Nakawa Division, Kampala.**

ii. The applicant may exercise any of its rights in the property comprised in **KCCA 15 Folio 19 Block A Unit No. 3 Condominium Plan 0109, Plot 13 Peninsula Close, Nakawa Division, Kampala** in accordance with the law.

iii. Costs of this application are awarded to the applicant.

Patricia Mutesi

.....

Patricia Mutesi

JUDGE

(31/01/2024)