THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT KAMPALA

HIGH COURT CIVIL SUIT NO. 1305 OF 1998.

ROSEMARY

KITYO…….

PLAINTIFF

VS

1. IMPALA COMMODITIES LTD]
2. MBEKEKA BUKENYA KISITU……...

DEFENDANTS.

BEFORE: V.F.MUSOKE-KIBUUKA (JUDGE)

JUDGEMENT.

The plaintiff sued the two defendants jointly and severally. She seeks the following orders against them:

a) a permanent injunction to restrain the defendants jointly and severally, their servants or agents, from selling or alienating the plaintiff's property known as leasehold Register volume 850, Folio 6, Kyaddondo Block 15, plot 310, situate at Nsyambya in the city of Kampala;

b) a declaration that the plaintiff is entitled to pay only the money which she took from prefinance money provided by the first defendant and that the first defendant is duty bound to look for the second defendant;

c) a declaration that the attempted foreclosure by the first and third defendants are unlawful and null and avoid;

d) general damages to the plaintiff for wrongful eviction and trespass;

e) special damages representing the damages occasioned in the failed eviction; and

f) costs of the suit.

The facts leading to this litigation may be stated, in brief, as set out below.

The first defendant was, in 1997 a company dealing in the business of purchasing coffee directly or through contracted suppliers. The company would enter into pre-financing contracts with prospective coffee suppliers where it considered appropriate to do so.
On 10th March, 1997, the plaintiff and the second defendant, Mbekeka Bukenya Kisitu, entered into a coffee supply contract with the first defendant. The two were to supply to the first defendant a total of 17 metric tons of Robusta FAQ at 13% moisture level. The deliveries were to be made at the first defendant's warehouse, Ntinda Industrial Area, Kampala, within a period of 7 days from the date of the contract, which was 13th March, 1997. The deliveries were to be made against pre-financing of Shs. 20,000,000/= paid to the plaintiff and the second defendant on the date on which the supply contract was executed. The supply contract is exhibit P3 on the court record.

On the same day, 13th March, 1997, the plaintiff and the second defendant jointly executed a Mortgage and prefinancing Deed in respect of the Shs. 20,000,000/= given to them by the first defendant. The money was secured by the certificate of title to Kyaddondo Block 15, plot 310, at Nsambya. A cheque in the sum of shs.20, 000,000/= was also deposited. The Mortgage Deed is exhibit P1 on the court record.

By 15th April, 1997, the plaintiff and the second defendant had not made any coffee delivery to the first defendant. That prompted the first defendant to give a written notice to the plaintiff threatening foreclosure under the Mortgage Deed (see Exh. D4). On 28th April, 1997, Messers Akampurira & Co. Advocates wrote Exh. D5 requesting on behalf of the plaintiff and the second defendant an extension of one month within which to deliver the coffee. The one month extension was granted by the first defendant.

On 29th April, 1997, the second defendant delivered to the first defendant some 3791 Kilogrammes of coffee which was equivalent to 3.791 metric tons worth shs. 4,549,200/= in value. The second defendant appears to have withdrawn from the scene after the delivery of the 3,791 kilogrames of coffee.

On 1 4th August 1997, five months after the coffee supply contract and prefincing and Mortgage Deed were executed, the suit property, was advertised in the New Vision Newspaper for sale. The plaintiff appears to have briefed messers Emesu and Co. Advocates, who, on 13th September, 1997, wrote exhibit D7 to the first defendant and Messers Simba Speed Auctioneers, threatening to sue them if foreclosure and a sale of the plaintiff’s property ever took place.

For a period of over one year, after the advertisement, no sale ever took place. The plaintiff appears to have taken no further substantial steps to prevent it.

On 14th October,1998, the plaintiff's house on plot 310 Nsambya, Kyaddondo, Block 15, was finally sold, by private treaty, to Banvery Bruno Antoine Georges, DW2, who paid the entire purchase price of shs 24,000,000/=.

For over four years, the plaintiff has resisted the purchaser's efforts to take vacant possession. She filed this suit in this court on 11th December, 1998, seeking inter alia, a declaration that the fore closure was null and void.

The following five facts were agreed upon during the scheduling conference:

a) that under a mortgage and prefinancing agreement the plaintiff and the second defendant were advanced a sum of shs. 20,000,000/= by the first defendant, on 13th March, 1997.

b) that the mortgage was secured by the certificate of title for Kyaddondo block 15, plot 310, at Nsambya and in the names of the plaintiff;

c) that a cheque drawn by the second defendant in the sum of Shs. 20,000,000/= was received on the same day by the first defendant.

d) that the mortgage was legal and was registered as an encumbrance upon the certificate of title to Kyaddondo block 15 plot 310, and

e) that coffee worth only UGs. 4,549,200/= was supplied to the first defendant under the mortgage and prefinancing agreement.

In view of the agreement by both parties upon the above facts, there remained three issues for the decision of the court:

a) whether the plaintiff and the second defendant honoured their obligations under the mortgage;
b) whether the first defendant lawfully sold the security under the mortgage; and
C) what remedies are available to the parties?

The plaintiff gave evidence in support of her case. She called no witnesses. She appears as PW1 on the record. The first defendant presented two witnesses DW1 was Mr. Clande Auberson, who stated that he was the managing Director of the first defendant. DW2 was Mr. Bouvery Antione Georges, who purchased the suit property. Both counsel made submissions in writing.

I will briefly analyse the evidence before me and the submissions of both counsel in relation to each issue but bearing in mind, as I must, that in civil suits, and as a general rule, the burden of proof in the sense of establishing a case upon a balance of probabilities lies upon the plaintiff. J.K Patel vs. Spear Motors Ltd. SCA NO. 4 of 1991. And, however, that he who makes an allegation must prove it. For the burden of proof to any particular fact, lies on that person who wishes the court to believe in its existence. S. 102 of Evidence Act.

ISSUE NO. 1

There is nothing in the plaintiff's pleadings suggesting that either herself or the second defendant did meet the obligation under the mortgage. There is no such claim in the pleadings.

In her evidence the plaintiff did not deny that she signed the coffee supply agreement or the mortgage and pre-financing agreement. She identified her signatures on both documents.
The plaintiff's evidence left the impression upon this court that it was largely contradictory and

unreliable. She attempted to extricate herself from liability by pleading and stating in court that when she signed the mortgage and prefinancing agreement she did not fully understand the contents because the documents were not first read or explained to her. In cross-examination, however, she contradicted that by stating that when she signed the mortgage and pre-financing agreement she was in full knowledge of what she was doing, which tends to support the evidence of DW1, Mr. Auberson, that before the plaintiff and the second defendant signed the supply contract and the mortgage and pre-financing agreement, the contents of each document were fully explained to each of them by one Ms Slyvia Sivo, the company Secretary to the first defendant.

Moreover, the plaintiff's certificate of title a copy of which is on the court's file clearly shows that the plaintiff was not unacquainted with the process and, probably, consequences of mortgaging her certificates of title. The certificate had been mortgaged twice prior to mortgaging it to the first defendant.

The plaintiff also testified upon oath that she never received any portion of the shs. 20,000,000/=, the subject of the coffee supply contract and the mortgage and prefinance agreement. That testimony, upon oath, was a clear lie because the plaintiff had earlier testified that the reason for which she agreed to mortgage her certificate of title was for her to receive a commission from the second defendant. In her plaint, in paragraph 8, the plaintiff pleaded that from the Shs. 20,000,000/=, involved in the mortgage and prefinancing agreement she had only received shs. 5,000,000/=. Furthermore, one of the prayers the plaintiff sets out in the plaint is for a declaration that she should be required to refund only the portion of the prefinance taken by her from the Shs. 20,000,0001=. Thus the plaintiff actually lied, upon oath, that she had received no portion of the Shs. 20,000,000/= prefinancing.

Furthermore, the plaintiff lied to court that she had herself paid shs. 11,000,000/= of the shs. 20,000,000/= prefinancing received by herself and the second defendant from the first defendant.

That claim was, clearly a lie too.

First, the Shs. 4,549,200/=, the value of the one delivery of coffee weighing 3791 kilogrammes was not delivered by the plaintiff to the first defendant. It was delivered by the second defendant as part performance of the obligation under the prefinancing agreement.

The plaintiff claimed that she had paid a sum of Shs. 2,500,000/= to messers Mwesigwa Rukutana and Company Advocates for transmission to the first defendant. She could neither produce evidence to support her claim or call a witness from messers Mwesigwa Rukutana and company to support that claim. Nor was there any evidence to show that the claimed amount of 2,500,000/= was ever paid to the first defendant.

Lastly, the plaintiff claimed that she had paid shs. 4,000,000/= in court as part payment of the prefinancing loan. This claim, in my view, is also far from the truth.
The court record clearly shows that on the 15th day of July, 1999, the plaintiff through Miscellaneous Application No. 840 of 1999, sought an order preventing the commissioner of Land Registration from removing the caveat which the plaintiff had lodged as instrument number 297950 on 23Id November 1998. on l5" November, 2000 the Honourable Anne Magezi , J., who heard Misc. Application No. 480 of 1999, ordered the extension of the caveat on condition that the plaintiff deposits before 29th March 2001, a sum of Shs. 10,000,000/= as security. The plaintiff failed to deposit the Shs. 10,000,000/= as required by court. She, however, deposited a total of Shs. 40,000,000/= paid in three installments.

On 12th June, 2002, the plaintiff wrote to the Registrar of the High Court seeking a refund to her of the money she had deposited.

It appears to me that whether that money was refunded to the plaintiff by the court or not, it was never paid in court as part payment of the prefinance loan. The cumulative effect of those lies upon the evidence of the plaintiff is to render it entirely suspect an unreliable.

On the other hand the first defendant gave highly credible evidence describing how the supply and prefinance contracts were negotiated and entered into by the parties and the subsequent failure by the plaintiff and the second defendant to honour their obligations under those arrangements.

The main obligation of the plaintiff and the second defendant as specified in exhibit P1, the prefinance agreement, was for the two to supply a total of 17 metric tons of Robusta FAQ at 13% moisture level within a period of 7 days. The evidence clearly shows that only 3.791 metric tons of coffee were delivered. Even that delivery was not effected within the contractual period of 7 days. It was made some 46 days from the date of the execution of the mortgage.

Thus the evidence on record can lead to no other conclusion but to answer issue no 1 in the negative.

ISSUE NO 2.

This issue deals with the legality of the sale of the security. It was an agreed fact that the mortgage was legal and was registered as an encumbrance upon the certificate of title. It was also an agreed fact that in addition to the security of the certificate of title for Kyaddondo Block 15, plot 310, at Nsambya, the Shs. 20,000,000/= was secured by a post-dated cheque of Shs. 20,000,000/=, written by the second defendant.

There is also no dispute that the sale of the suit property was advertised in the New Vision Newspaper, of the 14 August, 1997 and the sale took place on October, 1998, more than one year

after it had been advertised.
Mr. Mugogo, learned counsel for the plaintiff, has made several distinctive submissions why the plaintiff faults the first defendant's action of selling the security under the mortgage.

First, it was submitted for the plaintiff that since two securities had been availed to the first defendant, it ought to have exercised due diligence to recover the prefinancing sum of 20,000,000/= by presenting the cheque of 20,000,000/= which had been drawn in favour of the first defendant as a further security.

Second, counsel for the plaintiff argued that the sale was carried out before any valuation of the security was done in spite of the fact that the plaintiff had through exhibit D7, demanded that a valuation be carried out before any sale. Third, it was the plaintiff's case, that the security was wrongly and hurriedly disposed of, moreover at a far less value of Ug.Shs. 24,000,000/=.

I have closely examined the above submissions in light of the pleadings of the parties and the evidence before me. I find not much merit in any of them.

First, there is nothing in the mortgage agreement that obliged the first defendant to cash the post dated cheque of shs. 20,000,000/= in preference to exercising its right of fore closure. It is clear that the post-dated cheque was drawn as an "additional" security. The principal security was the certificate of title. It is a matter of common knowledge that, ordinarily, cheques become stale six months after they are drawn. The sale of the security took place 17 months from the time of the depositing of the securities. At that time there was no longer any choice to be made by the first defendant between the certificate of title and the post-dated cheque. In any case, the plaintiff herself stated that the second defendant disappeared from the time she took the money. The plaintiff could not find her. It does not appear to me to be reasonable to expect the second defendant who had, apparently fled from her obligations under the mortgage to have left any

money on her account in the circumstances.

I agree with Mr. Byenkya that the sale of the plaintiff's security was lawfully carried out under clause 3 of the mortgage agreement between the parties and section 9 of the Mortgage Decree 1974. There is nothing precluding the plaintiff from demanding an account of the proceeds of the sale from the first defendant. That was not part of the plaintiff's pleadings in this suit. Neither has the plaintiff pleaded or shown by any credible evidence that the security was sold at an unreasonably low price.

As to the argument that the plaintiff's security was hurriedly sold, the evidence on record does not appear to me to justify that claim. The plaintiff had plenty of time to redeem her security. She failed to utilize the opportunity.

I, therefore, find that the plaintiff lawfully foreclosed under the mortgage and lawfully sold the security by private treaty. The purchaser of the property, DW2, Bourvery Bruno Antoine Georges, has the right to vacant possession of the property since he lawfully purchased it.

ISSUE NO. 3.

This issue deals with the remedies available to the parties.

The six remedies sought by the plaintiff in her plaint were listed at the beginning of this judgment. Owing to the evidence adduced by her before this court, there is no basis upon which she can be said to merit any of those remedies. The plaintiff has failed to prove the case against the defendants on a balance of probabilities.

On the other hand, the first defendant, in the counter claim, seeks:

First, an eviction order against the plaintiff to enable him hand over vacant possession of Kyaddondo, Block 15, plot 310 to DW2, Mr. Bouvery Bruno Antoine Georges, who purchased the property on 14th October, 1998, by private
treaty. From the evidence on record, I am satisfied that the first defendant merits this particular order. The plaintiff has merely used this case to avoid her obligations. The purchaser is entitled to vacant possession. Accordingly, the plaintiff is to hand over vacant possession of Kyaddondo, Block 15, plot 310, to the first defendant before the expiry of 14 days from the date of the delivery of this judgment.

Second, the first defendant seeks special damages of Shs. 700,000/= paid by him to court brokers for the failed eviction of the plaintiff. Since no account has been made by the first defendant to the plaintiff in respect of the proceeds of the sale of her security, it does not appear to me to be fair to award the sum of Shs. 70O00O/ to the first defendant as special damages. It can conveniently be included in that account.

The first defendant sought general damages for the inconveniences caused to it and for breach of contract. I appreciate the legal position which in relation to the circumstances of this case would entitle the first defendant to some general damages. I, however decline to make any order in that regard because it appears to me that the order, if made, may not be altogether practically effective. Secondly, because the justice of the case considered as a whole tend to dictate that the order be not made against the plaintiff.
Lastly, I have very carefully considered the question of costs of this case. Normally, the general rule requires that the successful party is entitled to costs. In this case, however, there exist peculiar circumstances which render it
necessary for an order that each party takes care of its own costs and I so order.

In the final result, I make the following orders:

a) an order dismissing the plaintiff's case against both defendants.

b) an order requiring the plaintiff to hand vacant possession of Kyaddondo Block 15, plot 310, to the first defendant before the expiry of 14 days from the date of the delivery of this judgement.

c) an order requiring each party to meet its own costs.

V.F.MUSOKE-KIBUUKA (JUDGE)

19.5.2003.