THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL APPEAL No. 027/2014

(Arising from Land Suit No. 89 of 2012)

ATANAZIO BETUBIZA :::::::::::::::::::: APPELLANT

VERSUS

1. CENTENARY BANK
2. BITARABEHO SAKIRWA :::::::::::::::::::: RESPONDENT

BEFORE HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

The Appellant filed this Appeal against the Judgment and orders of **HW NYADOI ESTHER** Magistrate Grade I delivered in Kabale on 9th day of September 2014

The background to this appeal is that on the 17th of August 2006 the appellant, **ATANAZIO BETUBIZA,** obtained a loan of 4,000,000/- (Four million shillings) at an interest rate of 2% per month from the 1st Respondent (**Centenary Bank Ltd**). The loan period was 12 months. The appellant pledged his land at Rushoka Ruhega Kayanza as security for the loan.

The appellant allegedly defaulted on the repayment of the loan leading to the 1st respondent selling the appellants property to realise the outstanding sums. The 2nd Respondent, **BITARABEHO SAKIRWA** was the purchaser.

The appellant alleged that the 1st respondent knowingly sold off land which was not pledged as security for the loan well knowing that the appellant had paid up all moneys that were due and owing to the bank. Additionally that there was a

semi-permanent structure on the land that the appellant used as a store and from which he lost a number of items sold off with the store.

The 1st respondent stated that the appellant defaulted on the payment of the moneys owing despite several reminders and written demands. The bank gave the respondent several opportunities to pay which he failed to fulfil. An auctioneer was instructed to recover the money and on the 1st of November 2006 sold the security to the 2nd respondent at 2,500,000/- (Two million five hundred thousand shillings).

The trial magistrate disbelieved the plaintiff's/appellant's case and dismissed his suit with costs hence this appeal.

There were four ground of appeal namely,

1. The learned trial magistrate erred in law and fact in finding that the appellant had paid 4,061,000/- contrary to what was on the bank statement and never considered the credit balance on the bank loan statement.
2. The learned trial magistrate erred in law and fact for finding that the appellant had paid 4,061,000/- as opposed to 4,605,221/- and failed to see that the sale of the entire security for 4,605,221/- was an over attachment that makes the sale dubious and unlawful.
3. The learned trial magistrate erred in law and fact when she failed to realise that a mortgage is always a mortgage.
4. The learned trial magistrate erred in law and fact when she failed to realise that the land that was sold was security for a loan of 2004 worth 1,500,000/- and not that of 2006 worth 4,000,000/- thus occasioning a miscarriage of justice.

As this is a first appeal, this Court must subject the entire body of evidence to a fresh scrutiny and arrive at its own conclusions bearing in mind that it has not

seen the witnesses testify. Each ground must be proved on a balance of probabilities.

I shall consider the grounds in the order they were argued.

Ground 1

> **The learned trial magistrate erred in law and fact in finding that the appellant had paid 4,061,000/- contrary to what was on the bank statement and never considered the credit balance on the bank loan statement.**

The argument for the appellant here is that he obtained two different loans from the 1st respondent, one in 2004 and another in 2006. For the loan in 2006 he obtained a sum of 4,000,000/- (four million shillings) which he paid in full. It is stated that exhibit PE V shows that he cleared all outstanding sums and there was a balance of only 28,551/- after he had paid in full.

This Court has looked at PE V. It is a bank statement which runs from the 6th of June 2007 (when the opening balance was 28,551/-) to the 30th of September 2007 when there was 1,089/- on the account.

PE 3 is the loan agreement which was concluded between the parties on the 17th of August 2006.

There is a second bank statement - DEx 3. It shows an entry for the 17th of August 2006 described as 'loan advance' in the sum of 3,907,000/-. The statement goes on to show several transactions, some described as automatic loan payment withdrawal, up to 9th November 2007 with the last item described as 'auctioneers fee'.

DW1 Robert Tugume, a banker with the 1st respondent, stated that PEx 5 was the statement of a savings account while DEx 3 was the loan account statement.

This court believes Dw 1 not least because DEx 3 shows the loan deposit while the PEx 5 does not (the money deposited on the 17th of August 2006 as is

indicated on the loan statement). It is conclusive proof that DEx 3 is indeed the correct statement to consider in this case when evaluating loan payments.
I shall return to this item later.

Ground 2

> **The learned trial magistrate erred in law and fact for finding that the appellant had paid 4,061,000/- as opposed to 4,605,221/- and failed to see that the sale of the entire security for 4,605,221/- was an over attachment that makes the sale dubious and unlawful.**

The contention of the appellant here is that he paid back all the money owed on his loan. The loan sum was 4,000,000/- with the repayment owed amounting to 4,605,221/- after interest was added. Counsel argued that the appellant paid off 4,061,000/- to the bank and only had a balance of 544,221/- left unpaid. Therefore when the appellant's property was sold off at 2,500,000/- it amounted to an over attachment. Secondly there is no evidence that there was any money left over after the sale, and if at all there was any, it was not given back to the appellant.
Counsel for the respondent contends that the appellant himself admitted defaulting on the loan repayments. That the evidence also showed that the loan was not repaid in the agreed period of time. That Para 14 of the loan agreement allowed the 1st respondent to sell the security by way of private treaty and hand over any balance after recovery of the loan plus interest.
It was argued that when the security was sold, one million one hundred and ninety three thousand seven hundred and five shillings (1,193,705/-) was deducted as the outstanding balance. 568,000/- was also removed to pay the fees of the auctioneer and the rest, 735,784/-, was left on the account for the appellant.

It is stated that there was no over attachment and the lender strictly followed the provisions of the loan agreement which allowed sale in the event of default of payment.

I have looked at the agreed schedule for the repayment of the loan. Indeed the total outstanding amount owed to the bank where payments were made as scheduled would be 4,605,221/-.

DEx 3 however shows that there were several times when the appellant defaulted in re-payment. These include October 2006, March 2007, then May 2007 all through to the sale of the security in November 2007.

Paragraph 7 of the loan agreement indicates that where the borrower defaults to pay on schedule he shall be liable to a penalty of 0.5% per day from the date of default of payment on the instalment up to payment in full including payments of the expenses incurred in the recovery process.

The parties also agreed that in the event of failure to payback all the principal or any part thereof at the agreed time the lender was free to sell the security without recourse to courts of law.

In view of these provisions the total outstanding in this case would have been affected by the penalties provided for the periods payment was late. The bank states that the borrower would have to meet the expenses incurred during the recovery process.

Counsel for the appellant submitted that by the time of recovery 4,061,000/- had been paid and therefore the correct amount owing was 544,221/-. As can be seen from the loan agreement and DEx 3 this last figure would be correct where payment were made as scheduled. That was not the case here as penalties were incurred.

From the loan statement the amount owed as at 1st November 2007 was 1,193,705/-. This figure was not disputed at the trial by Counsel cross examining on it. Then when the security was sold at 2,500,000/- the figure owing had to be deducted. The auctioneer who recovered the money's was then

paid, again from the proceeds of the sale at 568,600/-, which was also deducted from the balance leaving a sum of 737,695/-. That amount was left on the appellants account.

From this Courts own analysis of the evidence there was no over attachment made.

From the foregoing the 1st and 2nd grounds of appeal cannot stand and must both fail.

Ground 3

The learned trial magistrate erred in law and fact when she failed to realise that a mortgage is always a mortgage.

The complaint under this ground is that the loan agreement concluded between the appellant and the 1st respondent provided that the security will be sold off by the 1st respondent upon default by the appellant. The argument of Counsel for the appellant is that this clause deprives the appellant of his equitable right to redeem his property. The maxim 'Once a mortgage always a mortgage' protected the appellant. That there should be no clog on the equity of redemption and court shall not permit any attempt by the mortgage to exclude the mortgagers right to redeem his property. Counsel cited **Matambulire vs Kimera (1975) HCB 150 where it was held that** *the respondent could redeem his land on the due date or at any time after the date set for repayment of the debt. Secondly that the appellant was entitled to enter into possession but once he chose to do so he held the kibanja as a trustee of the respondent who retained the right to redeem his kibanja on payment in full of the outstanding debt.*

I have already found (in ground 2) that the appellant did not pay up in full. He is therefore not protected by the law set out by his counsel as he who seeks equity

must do equity. He should have paid in full before he could rightly enforce his equitable remedy.

I have found that the appellant was in default on more than one occasion. DW 3 testified that the appellant was given two opportunities to pay after default. An agreement entered on the 17th of February 2007 shows the appellant undertake to pay sums outstanding up to that point. This followed a process initiated by DW 3 the auctioneer after he received instructions to recover the outstanding sums on the loan. The appellant failed to pay and asked for four months. It is alleged he was given those four extra months but still failed to repay.

Therefore the appellant in the instant case was accorded opportunity to pay before the security was finally sold off. In the result it is not true that his right to redeem his property was fettered.

In the result this ground fails

Ground 4

> **The learned trial magistrate erred in law and fact when she failed to realise that the land that was sold was security for a loan of 2004 worth 1,500,000/- and not that of 2006 worth 4,000,000/- thus occasioning a miscarriage of justice.**

The gist of the contention in this ground is that the security that was sold off by the bank to recover the outstanding loan amount is not the one offered by the appellant to secure his loan of 4,000,000/-. He avers it was a plot located at Nyabiyanga cell, Ruhega Parish in Kayonza Sub County in Ntungamo district. His argument is that this was a security he had pledged for a loan of 1,500,000/- he obtained in 2004. The plot had a commercial building with a kitchen and latrine. The loan was fully paid for but the bank retained the security.

The security he pledged for the loan in 2006 was a banana plantation on a Kibanja in Rushoka in Ruhega which is found in Kayonza Sub County in

Ntungamo district. The appellant states that both are in Rushoka but are different (see pg 19 proceedings).

I note that the loan agreements for the two respective disbursements are exhibited as PE II and PE IV.

There is also a mortgage pledge agreement that was executed between the parties for the 4,000,000/- loan. It is signed by LC officials and states the land is in Naybiyanga. The 1st respondent through DW 1 states that the security is the same because the appellant used it for both loans.

The process leading up to the sale of the property was protracted. I have seen no protest by the appellant that the respondent was pursuing or selling the wrong security. He signed an undertaking 17th of February 2007 on the same security that was eventually sold. There were LC officials involved as were guarantors of the loans in both instances. None of these were produced to verify claims that the wrong security was sold. The actions of the appellant indicate that the protest that the wrong security was sold only arose as an afterthought. I am not persuaded that the wrong security was sold.

In the result the 4th ground of appeal fails.

In the result this appeal is dismissed with costs. The Judgement and orders of the lower court are confirmed.

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Michael Elubu

Judge

14.09.2017