

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT MUKONO
MISCELLANEOUS CAUSE NO 003 OF 2021**

EXIM BANK (UGANDA) LIMITED APPLICANT

VERSUS

MPATANEL COMPANY LIMITED RESPONDENT

BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA

RULING

1. The Applicant filed this application by Notice of Motion under Section 98 of the Civil Procedure Act, Cap. 71 and Order 52 rules 1 & 2 of the Civil Procedure Rules SI 71-1, against the Respondent seeking for orders that:

(a) The Applicant takes physical possession of the mortgaged property comprised in Kyaggwe Block 93 Plot 1651 land at Kagala, Mukono;

(b) An order evicting the Respondent or its agents, assignees, servants, successors from the mortgaged property comprised in Kyaggwe Block 93 Plot 1651 land at Kagala, Mukono;

(c) Costs of the application be provided for.



2. The grounds of the application are in the affidavit in support sworn by Mr. Joshua Waidha, the Manager Monitoring and Recovery of the Exim Bank (Uganda) Limited (the Applicant) and they are that:
- (a) on the 12th day of March, 2020, the Respondent was granted a term loan in the amount of UGX. 60,000,000 (Uganda Shillings Sixty Million Only);
 - (b) the credit facilities were secured by legal mortgage over property comprised in Kyaggwe Block 93 Plot 1651 land at Kagala, Mukono, registered in the name of Bakisuula Ibrahim, the Director of the Respondent, personal guarantee and indemnity of the Directors that is Mpaata Nelson and Bakisuula Ibrahim;
 - (c) the Respondent defaulted on her repayment obligation under the mortgage deed leaving an outstanding loan of Ug. Shs. 101,490,826 (Uganda Shillings One Hundred One Million Four Hundred Ninety Thousand Eight Hundred Twenty-Six) as at 29th November, 2021;
 - (d) the Applicant issued the Respondent with all the statutory notices under the Mortgage Act which were ignored;
 - (e) all amicable efforts to have the Respondent or its agents, assignees, servants, successors vacate the mortgaged property have yielded no results, yet the outstanding loan amount is depositors money;

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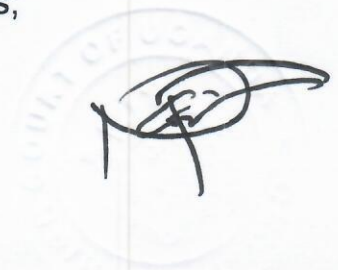
- (f) the Respondent or its agents, assignees, servants, successors have refused, ignored or neglected to vacate the mortgaged property for the Applicant to take possession and sell it to recover the outstanding loan amounts;
- (g) the Applicant seeks to take possession of the mortgaged property through a court order, the Respondent having defaulted on her loan obligations;
- (h) it is in the interest of justice that the application as prayed is granted to ensure that the Applicant can enforce its rights under the mortgage deed.

3. The application was opposed by the Respondent in an affidavit in reply sworn by Mr. Mpaata Nelson, the Managing Director of Mpatanel Company Limited (the Respondent) and filed in court on 20th May, 2022. It states as follows:

- (a) that the application and the supporting affidavit is fatally defective, full of falsehoods, frivolous and vexatious, lacks merits, an abuse of court process and a preliminary objection shall be raised to strike it out;
- (b) that the Respondent has never borrowed or applied for the credit facility as claimed by the Applicant;

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- (c) that the Deponent has never executed a personal guarantee and indemnity in his own right or as a director of the Respondent as claimed by the Applicant;
- (d) that all the documents attached by the Applicant are forgeries, since the Deponent has never signed or appended his signature on the impugned documents;
- (e) that the Applicant was negligent in failing to find out with Uganda Registration Services Bureau that a one Bakisuula Ibrahim whom it purported to deal with is not a shareholder or a director in the Respondent's company;
- (f) that the Respondent is not the registered proprietor of land comprised in Kyaggwe Block 93 Plot 1651 land at Kagala, Mukono and indeed a Certificate of Title which is attached and marked "B" explains it;
- (g) that the Respondent is not in possession of the land subject to this application neither does it have any developments thereon or its agents;
- (h) that the proper party to this application is Bakisuula Ibrahim who is the registered proprietor not the Respondent;
- (i) that the whole loan transaction was tainted with illegalities on account of being executed without a proper company mandate and all machinated by the Applicant's officers;



- (j) that without prejudice to all the above, the amount claimed to commence foreclosure is over exaggerated and does not reflect the true position of the indebtedness as it is astronomical;
 - (k) that the Deponent inquired from the Applicant's Attorney the circumstances and basis upon which the impugned loan credits or sums were disbursed and up to date no explanation has ever been given; and
 - (l) that this application is premature as the Applicant has not exhausted the remedies of the fore closure under the Mortgage Act and Regulation.
4. Both parties filed their written submissions. The Applicant was represented by Counsel Agaba Edmond from M/s Shunobi Musoke & Co. Advocates while the Respondent was represented by Counsel Amany Joseph from M/s MORIAH & Co. Advocates.
5. The Applicant's counsel reproduced the grounds of the application in the Applicant's written submissions as codified in the supporting affidavit as already outlined above in the 2nd paragraph of this ruling. The Applicant's counsel submitted that the claim against the Respondent is for default on her repayment obligation under the mortgage deed leaving an outstanding loan amount of Ug. Shs. 101, 490,826 (Uganda Shillings One Hundred One Million Four Hundred Ninety Thousand Eight Hundred Twenty-Six) as at November 2021.

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Counsel concluded by praying that this application for an eviction order and order to take possession of the mortgaged property be granted with costs to the Applicant.

6. In opposition to the Applicant's submissions, the Respondent's counsel filed the Respondent's written submissions on the 20th May, 2022. He raised a preliminary objection to the effect that there is no cause of action against the Respondent with respect to the orders sought. That the certificate of title pledged as a collateral is registered in the names of Bakisuula Ibrahim who became the registered proprietor under Instrument No. MK 60083671 of 1st November, 2019 at 8:19 a.m. That the proper party to this application should have been the aforementioned person because the Applicant is not seeking to recover money but to foreclose the mortgaged property and therefore no cause of action is disclosed against the Respondent who is not the registered proprietor. That there is no evidence or proof demonstrating that the Respondent's agents are in possession of the mortgaged property. Counsel prayed that with the above objections, the application should be dismissed with costs to the Respondent.
7. The Respondent's counsel further submitted that this application is prematurely brought before court on account that the Applicant has not exhausted the efforts regarding the sale of the mortgaged property. That Regulation 8 (2) of the Mortgage Regulations, 2012 requires a mortgagee to advertise the property in the newspapers and Regulation 11 requires valuation of the required property and a detailed report that

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will show that the land is squatted and all these have not been done. That the Applicant has only attached mere notices of default, take possession and sale and that there is no advert and valuation. That the Applicant has not exhausted all the reliefs before embarking on possession and that there is no evidence of advertisement of the property to prove that the Applicant exhausted the fore closure remedy. Counsel cited the case of **ABC Capital Bank Ltd v. Muyanja Hussein & Anor, HCCS No. 530 of 2013**, where it was held that the failure to follow the procedure as laid down by the Mortgage Act and Regulations renders a suit premature.

8. Learned counsel averred that powers of a mortgagee are provided for under Part (V) of the Mortgage Act. Section 19 (1) stipulates that where money secured by a mortgage is made payable on demand, a demand in writing shall create a default in payment. That under Section 19 (2) if the mortgagor is in default of any obligation to pay a principle sum on demand or any interest or other relief payment or part or under a mortgage, or in fulfilment of any common condition express or implied in the mortgage, the mortgagee may serve the mortgagor notice in writing of default and require the mortgagor to rectify the default within 45 days working days. That where there is non-compliance with the notice of default under the section then sale of the mortgaged land takes place.
9. As to whether the credit facilities are valid and enforceable against the Respondent, the Respondent's counsel argued that Section 21 (1) of



the Companies Act, No. 1 of 2012 provides that the memorandum and articles shall, once registered bind the company and members of the company to the same extent as if they had been signed and sealed by each member and contained covenants on part of each member to observe all provisions of the memorandum and articles. Further, that Regulation 98 of Table A requires a resolution in writing. Article 54 of the Respondent's Articles of Association attached on paragraph 7 of the affidavit in reply requires a resolution of the members for the company to open a Bank Account and obtain a facility. That there is no such resolution from the members attached by the Applicant authorizing the opening of the bank account and borrowing.

10. Learned counsel contended that pursuant to the Court of Appeal judgment in **Necta 'U' Limited & John Ndyabagye v. Crane Bank Civil Appeal No. 219 of 2013 at page 16**, such a credit facility is unauthorized and illegal and as such, nothing lawful arises out of an illegality. That there was no proper company mandate and therefore in common law, the loss lies where it falls. That the Respondent is not liable and that the Respondent has never been a customer of the Applicant.

11. It is further submitted for the Respondent that the mortgage deed is defective for want of company seal and therefore invalid. That Article 70 in the memorandum and articles of association of the Respondent requires every instrument and documents executed by the company to be endorsed by seal. Counsel stated that according to the case of

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Necta 'U' Limited & John Ndyabagye v. Crane Bank (Supra), it was stated that "Black's Law Dictionary defines a common seal as a seal adopted and used by a corporation for authenticating its corporate acts and executing legal instruments. Thus, documents are legally executed under the company's requirement and cannot be a substitute to a common seal as recognized by law, neither would it have the effect of authenticating a document to which it is fixed. That in the instant case, the stamp affixed to the further charge was of no value to that document. It is neither authenticated nor validated it."

12. Counsel asserted that pursuant to paragraphs 6, 7, and 11 of the affidavit in reply, the facts in that case are on all fours with this application. That the banking credit facility letter has no company seal as well as the impugned collateral legal mortgage attached on paragraphs 2 and 3 of the affidavit in support of the application. That this is very fatal as it renders the Mortgage Deed invalid and that affixing a stamp doesn't cure the invalidity. Further, that the Respondent inquired from the Applicant the basis of advancing the credit facilities but up to now no explanation was offered as demonstrated in Annexure MN5 of the affidavit in reply.
13. Counsel contended that the amount claimed by the Applicant is disputed and that there is no way a loan of UGX. 60,000,000/= could have shoot to UGX. 101,490,826/=. That this is in line with the fact that the loan repayments were affected by the Covid-19 lockdown which had devastating effects on the economy. Counsel stated that this

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application is brought against a person who is not the registered proprietor of the mortgaged property and that Section 59 of the Registration of Titles Act, Cap. 230 provides that a certificate of title is conclusive evidence of ownership. That the photocopy of the title was attached and it's in the names of Bakisuula Ibrahim who is not a party to this application. Counsel prayed that the application be dismissed with costs to the Respondent.

Issues

(1) Whether the application discloses any cause of action against the Respondent

(2) Whether the Applicant can take possession and evict the Respondent from the mortgaged property.

14. The Respondent's counsel raised a preliminary point of law on the validity of the credit facility. According to Counsel, there is no cause of action against the Respondent with respect to the orders sought. That the mortgaged property that the Applicant is seeking court's order to take possession of is neither the Respondent's property nor is the Respondent in current possession of it or its agent. Both issues will be resolved concurrently.

15. In Mozley & Whiteley's Law Dictionary 11th Edition at page 40 a cause of action is defined as



“The ground on which an action can be maintained; but often extended to any claim on which any given action is, in fact, grounded, whether or not legally maintainable.”

In Tororo Cement Co. Ltd v. Frokina International Limited SCCA No.2 of 2001, it was held that a cause of action is disclosed when it is shown that the Plaintiff had a right, and that right was violated, resulting in damage and the Defendant is liable.

16. In my view, the question of whether a claim discloses a cause of action must be determined upon perusal of the claim itself together with anything attached to it. In the present case, the Applicant pleaded in paragraphs 2, 3 and 4 of the supporting affidavit sworn by Mr. Joshua Waidha that; on the 12th day of March, 2020 the Respondent was granted a term loan of UGX. 60,000,000 (Uganda Shillings Sixty Million Only); that the credit facilities were secured by a legal mortgage over property comprised in Kyaggwe Block 93 Plot 1651 land at Kagala, Mukono, registered in the name of Bakisuula Ibrahim, the Director of the Respondent, personal guarantee and indemnity of the Directors that is Mpaata Nelson and Bakisuula Ibrahim; and that the Respondent defaulted on her repayment obligation under the mortgage deed leaving an outstanding loan of Ug. Shs. 101,490,826 (Uganda Shillings One Hundred One Million Four Hundred Ninety Thousand Eight Hundred Twenty-Six) as at 29th November, 2021.
17. While the Respondent on the other hand contended in paragraphs 4, 5, 6, 7, 8 and 9 of the affidavit in reply sworn by Mr. Mpaata Nelson that the Respondent has never borrowed or applied for



the credit facility as claimed by the Applicant; that the Deponent has never executed a personal guarantee and indemnity in his own right or as a director of the Respondent as claimed by the Applicant; that all the documents attached by the Applicant are forgeries, since the Deponent has never signed or appended his signature on the impugned documents; that the Applicant was negligent in failing to find out with Uganda Registration Services Bureau that a one Bakisuula Ibrahim whom it purported to deal with is not a shareholder or a director in the Respondent's company; that the Respondent is not the registered proprietor of land comprised in Kyaggwe Block 93 Plot 1651 land at Kagala, Mukono; and that the Respondent is not in possession of the land subject to this application neither does it have any developments thereon or its agents.

18. Table "A" of the Companies Act, No. 1 of 2012 provides for powers and duties of directors of company but specifically Regulation 80 (1) of Table "A" of the Companies Act, is to the effect that:

"The business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting subject to these regulations and to the provisions of the Act and to such regulations, being not inconsistent with these Regulations or with the Act, as may be prescribed by the company in general meeting."

19. The Companies Act further empowers the directors of a company to either directly or indirectly nominate and appoint by power of attorney any company, firm or person or body of persons to perform the same functions for the company as that of the directors. Regulation 81 (1) of Table "A" of the Companies Act provide thus:

"The directors may from time to time and at any time by power of attorney appoint any company, firm or person or body of persons, whether nominated directly or indirectly by the directors, to be the attorney or attorneys of the company for such purposes and with such powers, authorities and discretions not exceeding those vested in or exercisable by the directors under these regulations and for such period and subject to such conditions as they may think fit, and any such powers of attorney may contain such provisions for the protection and convenience of persons dealing with any such attorney as the directors may think fit."

20. Further, under the Companies Act, 2012, the directors of a company may exercise all the powers of the company to borrow money and to mortgage or charged company's property. This is enunciated under Regulation 79 (1) of Table "A" of the Companies Act which stipulates that:

"The directors may exercise all the powers of the company to borrow money, and to mortgage or charge its undertaking, property and uncalled capital, or any part of it, and to issue debentures, debenture stock, and other securities whether



outright or as security for any debt, liability or obligation of the company or of any third party; except that the amount for the time being remaining undischarged of moneys borrowed or secured by the directors apart from temporary loans obtained from the company's bankers in the ordinary course of business shall not any time, without the previous approval of the company in general meeting, exceed the nominal amount of the share capital of the company for the time being issued, but a lender or other person dealing with the company shall not be concerned to see or inquire whether the limit is observed.”

21. However, such power to borrow is exercised by the directors upon passing a board resolution to that effect through a board meeting and where it is required that the company members sanction it, an Extra Ordinary General Meeting is organized to pass an ordinary resolution to borrow for the company by the company's directors or appointed attorneys. Nelson Nerima in his book **A Practical Guide to Company Law and Practice in Uganda, 2016**, stated at page 147 that:

“Usually, the power to borrow is exercised by the directors who pass the requisite board resolution. Where the sanction of the members is required, an extraordinary general meeting is called to pass an ordinary resolution to borrow.”

22. From the parties' pleadings considered above, this court finds contention as to the authenticity of the signature of Mr. Mpaata Nelson,



the Managing Director of the Respondent company who denies having executed a personal guarantee and indemnity in his own right or as a director of the Respondent as claimed and attached by the Applicant in its affidavit. He claimed that the attached documents containing his signature are forgeries. It is further contended for the Respondent that Mr. Bakisuula Ibrahim whom the Applicant purported to have dealt with is neither a shareholder nor a director in the Respondent's company. These serious contentions by the Respondent were neither rebutted by the Applicant's affidavit in rejoinder nor by the Applicant's written submissions in rejoinder even after this court directed it to do so if it so wished.

23. The court record does not have any attachment of a board resolution duly passed by the board of directors authorizing the borrowing of the said loan or any power of attorney appointing Mr. Bakisuula Ibrahim who is neither a shareholder nor the company's director to act for the company as the company's attorney. Therefore, I find that Mr. Bakisuula Ibrahim was not mandated or authorized to borrow the said loan on behalf of the company.

24. In addition, Regulation 79 (1) of Table "A" of the Companies Act cited above is very clear as to what property can be mortgaged by the company. It provides that the company may mortgage its own property when borrowing a loan. One would wonder why the said property claimed to have been mortgaged by the Respondent bears the name of Bakisuula Ibrahim and not the company's name if it indeed belongs

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to the company. The Respondent actually denies owning or being in possession of the mortgaged property. Moreover, the owner of the mortgaged property is not joined in this application as one of the Respondents.


25. Having found that the mortgaged property is not owned or possessed by the Respondent, I find that this application does not disclose any cause of action against the Respondent. In my judgment, there is a lot wanting in the application and I decline to grant any of the reliefs sought by the Applicant.

26. Therefore, on issue 2, I hold that the Applicant cannot take possession and evict the Respondent from the mortgaged property. The Respondent is neither in possession nor does the Respondent own the property the subject of this application. The Applicant is advised to pursue proper means of recovering its money from the person who borrowed the money that is, Bakisuula Ibrahim.

27. Pursuant to the foregoing, this application is dismissed with costs to the Respondent.

I so rule and order accordingly.

This ruling is delivered this^{25th} day of^{OCT.} 2022 by



FLORENCE NAKACHWA
JUDGE.

In the presence of:

(1) Counsel Ssemwogerere Emmanuel from M/s MORIAH & Co.

Advocates for the Respondent;

(2) Ms. Pauline Nakavuma, the Court Clerk.

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