

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT LUWERO
ORIGINATING SUMMONS NO. HCT-17-LD- OS-0001 -2023
PREMIER CREDIT LIMITED PLAINTIFF
VERSUS
IBRAHIM KYOTANALYA DEFENDANT
BEFORE LADY JUSTICE HENRIETTA WOLAYO
RULING

Introduction

1. By an originating summons filed on 13.3.2023, Premier Credit Ltd the plaintiff company brought this suit against the defendant under Order 37 rule 4 of the Civil Procedure Rules for determination of the following questions;
 - i) Whether the plaintiff is entitled to vacant possession of the mortgaged premises
 - ii) Whether the plaintiff is entitled to evict the defendant and/or his agents or anyone claiming under him from the mortgaged premises and handover possession thereof to the purchaser for value.
 - iii) Whether the plaintiff is entitled to costs of this suit.
2. The originating summons was supported by the affidavit of Rashid Kasujja, the Manager Recoveries in the plaintiff company which contained the grounds of the application. The Defendant filed an affidavit in reply deposed by himself. The plaintiff did not file an affidavit in rejoinder.

3. When the matter came up for hearing on 6.6.2023, court directed the parties to file written submissions as per the following schedule; the plaintiff was to file by 20/07/2023, and defendant by 3/8/2023 and the plaintiff was to file a rejoinder by 10/08/2023. Both parties complied with the schedule and I have carefully considered their submissions.

Facts of the case

4. According to the affidavit in support of Rashid Kasujja, the company was approached by Defendant Ibrahim Kyotanalya and a one Mike Aswa on the 19/09/2018 for a loan facility of **UGX.105,000,000/=** to finance their business, which facility was payable within eighteen(18) months. In paragraph 4, Kasujja deposed that the loan was secured by land comprised in **Plot 734, Block 60 at Nampunge Luwero district** (suit land) in the names of the defendant and unregistered land of Mike Aswa located at Zirobwe Gayaza Bulemezi.(no further details given).
5. According to Kasujja, the plaintiff advanced the said money but the defendant and Mike Aswa defaulted thereby prompting the plaintiff company to issue demand notices but in vain and as a result, the outstanding balance increased to **UGX.151,280,955/=**(inclusive of interest).
6. Subsequently, the plaintiff company embarked on recovery proceedings and upon lapse of statutory 45 days, a notice of sale was issued to the defendant and still he did not remedy the default and the plaintiff company was prompted to value and advertise the property for sale. The defendant was then on 22.12.2022 issued

with a notice to vacate the mortgaged premises comprised in Plot 734 Block 60 so as to enable the purchaser Aisha Malik to take possession and enable the plaintiff recover some of the monies due in the loan agreement.

7. An examination of annexures B and C which are described as loan agreements reveals some discrepancies. While the two documents are dated the same date of 19.9.2018, annexure B shows that the facility was for both Mike Aswa and the defendant .However, annexure C is a loan facility that only names the defendant on the top page as the mortgagor. This is a relevant fact because the defendant deposed that he guaranteed a loan for Aswa with his title to secure the loan in 2018 but that it was fully paid. In other words, the question is whether the defendant was a principal mortgagor or just a guarantor and for which loan facility. According to the defendant, in 2021, he approached the plaintiff for his title but he was ignored and he was shocked when the plaintiff destroyed his house.
8. The plaintiff's Valuer put the value of the defendant's land at 40,000,000/ with forced sale value at 24,000,000/ which begs the question as to the actual outstanding amount and secondly, the extent of Aswa's liability since only the defendant was sued. In other words, a loan facility for 105,000,000/ secured with land valued at 24,000,000/ forced sale value is a question that cannot be answered in an originating summons. Annexure G , a statement of the loan account shows 99m/ was advanced as the loan in January 2019 yet the loan agreement gives the sum of 105,000,000/. Lastly , as pointed out by counsel for the

defendant, the mortgage instrument was registered on 1.3.2018 yet the loan agreement was made on 19.9.2018. This anomaly speaks to the defendant's defence that an earlier mortgage which he guaranteed had been paid off. These questions have to be answered before the court can inquire into whether the plaintiff is entitled to an order for vacant possession.

9. As counsel for the defendant rightly points out, Order 37 rule 4 of the Civil Procedure Rules, a mortgagee may bring an action for sale, foreclosure, delivery of possession by an originating summons, however, under order 37 rule 7, the court has discretion to decline to determine questions placed before it. Furthermore, under Order 37 rule 8(2) the originating summons is initially ex parte so that if the court is satisfied that the matters raised can be dealt with by this procedure, it can order the summons to be served on the defendant.
10. In this case, the plaintiff took out a summons which he then served on the defendant without first appearing before me for directions contrary to order 37 rule 8(2). However, the omission not to follow the rules strictly is not fatal in light of Article 126(2) (e) of the Uganda Constitution 1995 as amended which enjoins courts to administer justice without undue regard to technicalities.
11. As I have found that the court cannot inquire into whether the plaintiff is entitled to vacant possession before inquiring into other fundamental questions, inter alia: whether one Aswa Mike paid off the loan; whether the defendant was party to an earlier mortgage which was paid off; the actual amount outstanding on the loan and

the liability of the defendant to pay the loan since he claims it was paid off by Aswa.

12. In the premises, the originating summons is dismissed. The plaintiff is at liberty to commence an ordinary suit against the defendant. The plaintiff shall pay the defendant costs of the suit.

DATED AT LUWERO THIS 14TH DAY OF NOVEMBER 2023

LADY JUSTICE HENRIETTA WOLAYO

Legal representation

Frank Tumisiime advocates for the plaintiff

Carthage Advocates for the defendant