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**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT UGANDA AT KABALE**

**ORIGINATING SUMMONS NO. 0042 OF 2022**

**POST BANK=====PLAINTIFF**

**VERSUS**

10 **HASHAKIMANA CHARLES=====DEFENDANT**

**BEFORE HON. JUSTICE SAMUEL EMOKOR**

**JUDGMENT**

15 The Plaintiff/mortgagee brings the instant action by originating summons under  
**Order 37 Rule 4 of Civil Procedure Rules** seeking this Court's determination of  
the following questions.

1. **Whether the Plaintiff/mortgagee is entitled to vacant possession of the  
mortgaged properties and if so whether the Plaintiff/mortgagee is  
entitled to evict the Defendant and his agents from the mortgaged  
20 properties and handover vacant possession thereof to the purchaser  
for value.**
2. **Whether the Plaintiff/mortgagee should be granted costs of the suit.**

25 This suit is supported by the affidavit of the Plaintiff's branch manager one  
Muhima Mohammed who avers that on the 29/08/2019 the Plaintiff advanced to  
the Defendant a credit facility of UgX 50,000,000/= repayable in 24 monthly  
instalments of UgX 2,693,728/= and that the same was secured by a legal  
mortgage on land comprised in Freehold Register Volume HQT1757 folio 4 Block  
(Road) 37 Plot 34 at Shozi Cell Gasiza Parish, Nyakabande Division Kisoro

5 Municipality, Kisoro District. Further that on the 28/09/2020 the Defendant obtained another loan of UgX 16,000,000/=. That the Defendant did not repay the loan(s) owed to the Plaintiff despite the loan being rescheduled and on the 09/12/2020 the Plaintiff recalled the loan and served upon the defendant a notice of default to clear the outstanding loan amount. That after the statutory period  
10 lapsed the Plaintiff issued the Defendant with notices of sale of the mortgaged property but the same was ignored by the Defendant prompting the Plaintiff to advertise the property in the Daily Monitor News Paper on the 28/06/2021 leading to its eventual sale through Dedaro Auctioneers International LTD to one Uwimana Francis at a tune of UgX 55,100,000/=.

15 That upon the sale the Defendant has refused to vacate the property and has made it impossible for the Plaintiff to take possession of the mortgaged property and hand it over to the purchaser hence the instant suit.

The Defendant despite proper service being effected upon him did not file an affidavit in reply to this suit.

20 At the hearing of this suit Mr. Ahebwa Obed held brief for Mr. Kahara Counsel for the Plaintiff. The Defendant did not enter any form of appearance.

This Court upon being satisfied that proper service was effected upon the Defendant and there being no reasons advanced for the Defendant's absence granted the Plaintiff's prayer to proceed ex-parte against the Defendant.

25 I have carefully studied the averments of the Plaintiff's manager deposed in support of this suit. I have also given due consideration to the submissions of the Plaintiff's Counsel.

5 In light of the above I will now proceed to determine the questions framed for determination by the Plaintiff.

**Question 1.**

**Whether the Plaintiff/mortgagee is entitled to vacant possession of the mortgaged property and if so whether the Plaintiff mortgagee is entitled to**  
10 **evict the Defendant and his agents from the mortgaged properties and land over vacant possession thereof to the purchaser for value.**

It is the undisputed evidence of the Plaintiff through its branch manager one Muhima Mohammed that on the 29/08/2019 and 28/09/2020 the Plaintiff advanced a credit facility to the Defendant in the sums of UgX 50,000,000/= and  
15 16,000,000/= respectively and that the same was secured by a legal mortgage on land comprised in Freehold Register Volume HQT1757 Folio 4 Block (Road) 37 Plot 34 at Shozi Cell, Gasiza Parish, Nyakabande Division, Kisoro Municipality, Kisoro District. Proof of the advancement of the loan facility was annexured as “A” for the UgX 50,000,000/= and “D” for the UgX 16,000,000/= while the  
20 certificate of title creating the mortgage was annexure “B”.

It is the Plaintiff’s evidence that the Defendant defaulted on payment of the above credit facility leading to the sale of the same by Pedaro Auctioneers International LTD following advertisement of the same in the Daily Monitor Newspaper of the 28/06/2021. This evidence is not disputed.

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5 **Order 8 Rule 3 of Civil Procedure Rules reads as follows:**

*“Every allegation of fact in the Plaint if not denied specifically or by necessary implication or stated not to be admitted in the Pleadings of the opposite party shall be taken to be admitted except as against a person under disability...”*

The Supreme Court in ***Habre International Co.Ltd versus Ibrahim Alarakia***  
10 ***Kassam and others SCCA No. 0004 of 1999*** held inter alia that

*“Whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross examination, it must follow that he believed that the testimony given could not be disputed at all”*

I therefore accept the uncontested averments of the Plaintiff in regards to the  
15 liability of the Defendant.

I have perused annexure “F” to this Suit which is the notice of default issued to the Defendant pursuant to **Section 19(2) (3) and (4) of the Mortgage Act.**

The Defendants indebtedness at the time of issue of the default notice stood at UgX 48,655,967/=. The Defendant acknowledged receipt minuting thereon “*I will*  
20 *pay by 20<sup>th</sup> December, 2020 all arrears*” and signed thereunder.

I am therefore sufficiently satisfied that prior to exercising her remedy of sale under **Section 20 (e) of the Mortgage Act** the Plaintiff did first comply with the requirement of Section 19 of the Act.

The Plaintiff therefore is entitled to vacant possession before it can handover the  
25 same to the new purchaser.

5 It therefore follows that the Plaintiff is entitled to evict the Defendant and or his agents from the mortgaged property.

The first question shall therefore be answered in the affirmative.

### **Question 2.**

#### **Whether the Plaintiff/Mortgagee should be granted costs of this suit.**

10 In deciding this issue this Court is guided by the provisions of **Section 27 of the Civil Procedure Act** which confers upon a Judge the discretion and full power to determine by whom and out of what property and to what extent costs incident to suits are to be paid and to give all necessary directions for that purpose.

Doespite this wide discretion, as a general rule the successful party in contested  
15 proceedings is usually entitled to an award of costs.

**See also Candiru Versus Amandua and 02 others HCCS No. 0019 of 2014.**

I therefore find that the Plaintiff being the successful party is entitled to the costs of this suit.

The 2<sup>nd</sup> question shall therefore be answered in the affirmative.

20 In the result all the questions are answered in the affirmative and an order is hereby issued to the Defendant to deliver vacant possession of the suit property comprised in Freehold Register Volume HQT1757 Folio 4 Block (Road) 37 Plot 34 at Shoji Cell, Gasiza Parish, Nyakabande Division Kisoro Municipality, Kisoro District to the Plaintiff.

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5 The Costs of this suit are awarded to the Plaintiff.

Before me,

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**Samuel Emokor**

**Judge**

**28/02/2023**

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