

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
HCT - 00 - LD - OS - 0014 - 2 - 15

ECOBANK UGANDA LIMITED ::::::::::: PLAINTIFF

VERSUS

KAKOOZA MUSA TRADING CO. LTD :::::::::: DEFENDANT

BEFORE: HON. MR. JUSTICE J. W. KWESIGA

JUDGMENT

This suit was brought under the provisions of **Order 37 Rules 4** and 8 of the **Civil Procedure Rules** by the Plaintiff represented by M/s Kigozi Sempala, Mukasa, Obonyo Advocates. The application is supported by affidavit sworn on 6th October 2015 by Alex Paul Okello, the Plaintiff's officer in charge of Recovery of Loans.

Order 37 Rule 4 Civil Procedure Rules provides that any mortgagee or mortgagor whether legal or equitable, among others, may take out as a course on originating summons for such relief of the nature as may be specified in the summons which, depending on the circumstances of each case include foreclosure, delivery of possession by the mortgagor, redemption, reconveyance or delivery of possession by the mortgagee. This procedure of Originating Summons serves the purpose of enabling the court to settle simple and straight forward cases without indulging in lengthy, tedious and costly proceedings under ordinary Plaints.

In the instant case the stated questions for determination are:-

1. Whether the Applicant as a legal mortgagee of the property comprised in Kyadondo Block 185 Plot 527 at Namugongo (The Mortgaged property) is entitled to foreclosure and sell the mortgaged property belonging to the Respondent as a Registered proprietor to recover all amounts due in respect of the Principle debt, interest and other charges

incidental thereto,

2. Whether the Applicant is entitled to sell the said mortgaged property by private treaty or public auction to recover the entire sum due to it and costs or expenses related thereto,
3. Whether the Applicant is entitled to vacant possession of mortgaged property, and if so the Applicant is entitled to evict the Respondent and/or her agents or anyone claiming under them from the mortgaged property and handover possession thereof to a purchaser for value or for the Respondent as a mortgagor to deliver possession of the property to the Applicant/purchaser.

When this Application came for hearing on 12th April, 2016 there was no sufficient evidence of service on record. The hearing was adjourned to 19th April 2016 with orders that fresh service be effected and clear evidence of service be filed before the Applicant can be heard on an application to proceed ex-parte. Fresh Hearing Notice was issued by the Registrar of this court on the 13th April, 2016 and served to the Respondents as evidenced by the affidavit of service sworn by Balyegisa Charles, a Law clerk from the Applicant's Advocates. This court was satisfied with the evidence of service and allowed the Application to proceed ex-parte. The brief facts of this case are as follows:-

- i) On/about the 30th day of July 2014, the Applicant granted the Respondent a loan of sh. 1,250,000,000/= for import purposes AND sh. 498,000,000/=. The terms of the offer and acceptance are laid out in the document xi_ executed by both parties on 4 August 2014. See annexure A to the affidavit in support of Originating Summons.
- ii) A legal mortgage was executed by the parties dated 28th July 2014 and registered as an encumbrance on the property comprised in LRV 4250 Folio 10 Plot 5270(Kyadondo Block 185)at Kiira Namugongo, Wakiso District registered in the Respondent's name.

On 20 January 2015, the Respondent was served with **NOTICE ON DEFAULT** (See Annexure B herein filed). The Applicant demanded payment of the outstanding in the sum of sh. 1, 732, 411,026/13 which was the outstanding debt as at 20th January 2015. This Letter among other things stated

“TAKE NOTICE that you are required under **Section 19** of the **Mortgage Act 8 of 2009** to pay the above mentioned sum of Sh. 1,732,411,026/13 within 45 working days from the date of this Notice to rectify the default. Interest on the said amount continues to accrue till payment in full. For avoidance of doubt the Notice period expires on 25th March 2015.” This annexure shows that Kakooza Musa received this Notice on 20th January, 2015.

The Respondent did not file any response to this application and did not appear for hearing thus excluding itself from the proceedings leaving this application not contested. This notwithstanding the Applicant has the burden to prove its case on balance of probabilities before the Application can

be resolved in its favour. In view of the above facts I will deal with each question stated for this court to provide answers:-

1. Whether the Applicant as a legal Mortgagee in respect of the suit property (mortgaged property) is entitled to foreclose and sell the property to realise its security?

It is already stated that the Respondent did not respond this Application, did not file any affidavit in rebuttal or in any other way contest this Application. I am satisfied that service of the court processes necessary before the hearing was served on the Respondent who chose to keep quiet and the presumption is that it did not contest this case and accepted as the truth what was stated in the application.

Order 8 Rule 3 of the Civil Procedure Rules states:

“Every allegation of fact in the Plaintiff, if not denied specifically or by necessary implication, or stated to be admitted in the pleading of the opposite party shall, be taken to be admitted, - - - but the court in its discretion require any facts so admitted to be prove otherwise than by that admissions.”

Pursuant to the above provisions the Respondent did not contest the indebtedness state in the default notice and this application being Sh.1,732,411,026/13 (Uganda shillings one billion seven hundred thirty two million four hundred and eleven thousand twenty six and thirty cents only). Absence of rebuttal of this sum of indebtedness amounts to admission of a sum. Refer to:-

- 1) Samwiri Massa Vs Rose Achen (1978)HCB 297**
- 2) Barclay’s Bank of Uganda Limited Vs Makaka Fred Mugerwa & Anor H.C (O/S) No. 004/2015 (unreported).**
- 3) Mayanja Bosco Vs Kasikukuru Lois Okum & Anor HC (O/S) 005/2008 (unreported).**

Section 117 of Registration of Titles Act provides that:-

“ Where money secured by a mortgage under this Act made payable on demand re-demand in writing pursuant to the mortgage shall be equivalent to the Notice in writing to pay the money owing provided for by Section 116 and no other shall be required to create the default in payment.”

Section 19 of the Mortgage Act 8 of 2009 provides:-

- “1. Where money secured by a Mortgage under this Act is made payable on demand, a demand in writing shall create a default in payment.**
- 2. Where the mortgagor is in default of any obligation to pay the principal sum on demand or interest or any other periodic payment or any mortgage or in fulfilment of any covenant or condition; express - the mortgagee may serve on the mortgagor a notice in writing of the default.”**

I am satisfied that the Applicant fulfilled the above essential steps that preceed an application to foreclose and sell the mortgage property. The contents of the default notice above

reproduced gave the mortgagor the opportunity to redeem the mortgaged property but he did not take the necessary steps to redeem the property.

The remedy available to the Applicant/Mortgagee is in section 26 of the Mortgage Act states:-

“1. Where the mortgagor is in default of his/her obligation under the mortgage and remain in default at the expiry of the time provided for the rectification of the default in the Notice served on him/her under Section 19 (3), a mortgagee may exercise his/her power to sell the mortgaged land.”

In view of the above provisions the Applicant is entitled to foreclose and sell the mortgaged property as ordered by court immediately below as remedies.

3. It is about 13 months from the date of Default. The practice is that the defaulting mortgagor be allowed six (6) months for redemption from the date of default. In the instant case 13 months have elapsed and it is not entitled to such more time. However I do exercise my discretion and allow the mortgagor thirty (30) days from the date of this Judgment as the period when the mortgagors right to redeem will be extinguished.
4. The Mortgagee shall sell the Mortgaged property by Public Auction after lapse of 30 days Notice of the sale in **New Vision** and **Daily Monitor** specifying the date and venue of the sale.

Costs of this suit are awarded to the Plaintiff.

Dated at Kampala this 22nd day of April, 2016.

J.W. KWESIGA
JUDGE.

In the presence of:

Mr. Richard Obonyo for Applicant. Parties
absent.

Miria- Court Clerk.

1. The Applicant, a legal Mortgagee, is entitled, upon the breach of the mortgage agreement, to foreclose and sell the mortgaged property to realise his security. This shall include taking vacant possession of the mortgaged Land for purposes of selling the property.
2. The Defendant/Mortgagor has one remedy, namely; to redeem the mortgaged property by paying the outstanding proved debt of Sh. 1,732,411,026/13 which has been due since 25th March, 2015 the effective expiry date of the Notice on the Defendant.