

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MUBENDE
ORIGINATING SUMMONS NO.03 OF 2023

POST BANK UGANDA LTD

PLAINTIFF/MORTGAGEE

VERSUS

SAJJA AGREY

DEFENDANT/MORTGAGOR

BEFORE HON JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

The Plaintiff brought this suit against the Defendant by way of Originating Summons for determination of the following questions -

- 1) Whether the Plaintiff/Mortgagee as the equitable mortgagee is entitled to foreclose and sale the mortgaged property to recover the monies due to it in respect of the principal amount, interest, costs and all other related charges arising from the defendant's loan.
- 2) Whether the mortgagee is entitled to sell the mortgaged property by public auction or by private treaty.
- 3) Whether the Plaintiff/Mortgagee is entitled to vacant possession of the mortgaged property and to evict the Respondent/his agents from the same.
- 4) Whether the Plaintiff/Mortgagee should be granted costs for the suit.

The Summons were supported by an affidavit deposed by Tumwesigye Nimrod the Branch Business Manager of the Plaintiff at Mubende and who is knowledgeable about the dealings between the Plaintiff and the Defendant.

The contents in the affidavit are summarized. The Plaintiff on request by the Defendant disbursed a loan of Uganda Shillings 20,000,000/= and an agreement to the effect was executed on 18th March 2021. The loan was repayable in 12 monthly instalments of Uganda Shillings 1,949,743/=. It was secured by an equitable mortgage on 2 Plots of unregistered land with developments thereon located at Nyansimbi LC1, Birembo Sub County in Kakumiro District.

The defendant defaulted and on 20th June 2021 wrote to the Plaintiff requesting for a grace period of 3 months. The Plaintiff rescheduled the repayments and gave the Defendant a grace period of 2 months from 20th July 2021 to 20th August 2021. The loan repayment period was further amended to 14 months and the instalments revised to Shillings 1,759,825/=.

The defendant defaulted and the Plaintiff demanded the outstanding arrears of Shillings 3,519,650/=. On 12th November 2021 the Plaintiff served on the defendant a Notice of Default and recalled the loan then amounting to Shillings 18,981,297/=. On expiry of the statutory period, the Plaintiff served the defendant with a Notice of Sale which was ignored. The property was advertised for sale and for the defendant to give vacant possession for ease of inspection by potential buyers.

The defendant refused to vacate the property, threatens potential buyers and as at the time of filing the suit, a sum of Shillings 24, 676, 313/= was due and owing exclusive of Auctioneers fees of Shillings 3,367,631/=. The actions prompted the Plaintiff to lodge the suit.

The defendant filed a Reply admitting the business loan of Shillings 20,000,000/= which he used to construct premises but was hit by the Covid pandemic, death, treatment costs on family members and an accident when a truck knocked the building all which affected his cash flow.



It is admitted that the loan repayment terms were revised and that when he failed to meet his obligations, he agreed with the Plaintiff's Manager to jointly look for potential buyers for the building so that the mortgage is serviced. The defendant denies that he refused to vacate the premises and/or stopping potential buyers from inspecting it.

It is contended by the defendant that the value of the property is far above the loan amount and a sale by public auction may not be the most viable method to recover the loan amount and that foreclosure should be the last resort. The Defendant prays for the dismissal of the application with costs.

Counsel for the Plaintiff filed submissions as directed by the court but the Defendant did not do so. I will consider the issues as raised in the suit but will not reproduce the submissions.

Issue 1:

Whether the Plaintiff/Mortgagee as the equitable mortgagee is entitled to foreclose and sale the mortgaged property to recover the monies due to it in respect of the principal amount, interest, costs and all other charges related arising from the defendant's loan.

Order 37 rule 4 of the Civil Procedure Rules on which the suit is premised provides for a mortgagee with legal or equitable interest to take out Originating Summons for a number of reliefs including sale, foreclosure and delivery of possession by a mortgagor.

The defendant does not contest the mortgage transaction. A perusal of the documents filed by the Plaintiff shows that they comply with the form prescribed in the **Mortgage Regulations No.2 of 2012**. The mortgaged property is unregistered land which still can be used as collateral under **Section 3(1) of the Mortgage Act. Act No.8 of 2009**.

The Plaintiff did not furnish evidence of registration of the mortgage as required by **Section 3(4) of the Mortgage Act**. An informal mortgage however is enforceable between the parties under **Section 3(8) of the Mortgage Act**.

I thus find nothing prohibiting the Plaintiff from foreclosing and selling the mortgaged property to recover the entire sum and all monies due to it in respect of the principal amount, interest, costs and other charges relating to the loan disbursed to the Defendant.

Issue 2:

Whether the mortgagee is entitled to sale the mortgaged property by public auction or private treaty.

Section 19 of the Mortgage Act provides for service of a Notice of Default on a Mortgagor who has not met his/her loan obligations. The Mortgagee however can only sell the mortgaged property after the expiry of 21 days from the date a Notice of Sale was served on the Mortgagor under **Section 26 of the Act**.

The sale has to be by Public Auction unless the Mortgagor consents to one by Private treaty as provided for by **Section 28(1)(d) of the Act** and **Regulations 8(1) of the Mortgage Regulations.SI No.2 of 2012**.

The Defendant contends that he agreed to him and the Plaintiff sourcing buyers which was not supported with any documentary evidence. The defendant can still look for buyers and agree to a sale by Private treaty with the Plaintiff under **Regulation 10 of the Mortgage Regulations**. This being a Court ordered sale however as concluded in Issue 1 above, the sale shall be by Public Auction in compliance with **Sections 27 and 28 of the Mortgage Act**.

Issue 3:

Whether the Plaintiff is entitled to vacant possession of the mortgaged property and to evict the defendant/his agents from the same.

The Plaintiff being entitled to foreclose shall be handed vacant possession of the property for ease of inspection by potential buyers and is entitled to evict the defendant if he refuses to hand over the property after due notice has been served on him by the Plaintiff.

Issue 4:Costs

Costs of the suit shall be paid to the Plaintiff/Mortgagor.



Moses Kazibwe Kawumi

Judge

31st July 2023