

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
[LAND DIVISION]  
MISCELLANEOUS CAUSE NO. 0073 OF 2020

1. EASTER SANTOS OKIDI  
2. WINNIE OKIDI

}

APPLICANTS

V

DFCU BANK LTD

RESPONDENT

BEFORE: - HON. LADY JUSTICE P. BASAZA- WASSWA

R U L I N G

Representation:

**Ms. Noeline Candiru** holding brief for Innocent Ali Balpe for the Applicants

**Ms. Winnie Atwine** for the Respondent

Introduction:

[1] This is a Ruling on an application brought by Ms. E. Okidi and Ms. W. Okidi ('the Applicants') against DFCU Bank Ltd ('the Bank'), over land with developments comprised in LRV 4250 Foilo 13, Plot No. 356, Kyadondo Block 252 at Gaba, Kampala, measuring 0. 15 of an Acre. (Hereinafter referred to as: 'the suit property').

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- [2] The Application was by motion under **Sections 19 and 98 of the Civil Procedure Act<sup>1</sup>, Sections 14 and 33 of the Judicature Act<sup>2</sup>, Section 34 of the Mortgage Act 2009<sup>3</sup>, and Order 52 Rule 1, 2 and 3, of The Civil Procedure Rules<sup>4</sup>.**
- [3] The Applicants seek:
- i) An order for relief against the exercise by the Bank as mortgagee, of the remedies under Section 20 of the Mortgage Act, 2009 over the suit property.
  - ii) A declaration that the Bank as mortgagee, breached her obligations in respect of the suit property, and is liable for damages and loss.
  - iii) An order compelling the Bank to compensate them.
- [4] This case was initially filed in this Division in May 2018 as Misc. Cause No. 54 of 2018. Regrettably it has dwelt that long (almost 6 years) in our court system. The first trial Judge Kaweesa, J., transferred it to the Commercial Court on account that it is a matter founded on a mortgage. As it were, the next trial Judge: Bitature Anna, J., then transferred it back to this Division on account that it is not a commercial matter.
- [5] Although I too find it a commercial matter founded on a mortgage and best suited to the Commercial Division, I will nonetheless determine it to avoid further back and forth case file movement.

*Nasir Wamwe 7/3*

<sup>1</sup> Cap 71

<sup>2</sup> Cap 13

<sup>3</sup> Act 8 of 2009

<sup>4</sup> S.I 71-1

Background:

- [6] It is common ground to the parties in this case, that **M/s Dasawihi Ltd**, a company in which the Applicants are both Directors, obtained a loan from M/s Crane Bank Ltd, the predecessor in title of '**the Bank**'.
- [7] It is further common ground that by a Mortgage deed dated February 23, 2012 the Applicants, as joint registered proprietors of the suit property, mortgaged the suit property to M/s Crane Bank Ltd to secure the repayment of the said loan.
- [8] It is also common ground that **the Borrower: M/s Dasawihi Ltd**; defaulted in repayment of the said loan, prompting the Bank to take possession of the suit property in 2015.

The Applicants' case:

- [9] In their motion and supporting affidavit, the Applicants contend;
- i) That when the Bank took possession of the suit property, it was valued at **UGX. 325,000,000/=** (Three Hundred Twenty-Five Million shillings). They relied for that on a valuation report dated July 2, 2015 marked '**NT 3**' attached to their affidavit.
  - ii) That the Bank neglected and abandoned the suit property and subjected it to vandalism, extensive damage and depreciation in value. They relied on a valuation report dated October 5, 2016 attached to their affidavit as '**NT 4**'.

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- iii) That the suit property depreciated further in May 2018. They attached a further report marked **'NT 5'**
- iv) That the Bank failed to sell the suit property and entered into a fresh repayment arrangement with M/s Dasawih Ltd and surrendered back the suit property to the Applicants.
- v) That upon receiving back the suit property, the Applicants spent a substantial sum of money to the tune of **UGX. 70,000,000 (Seventy Million)** in repairing the suit property.
- vi) That on seeing that the suit property was in good shape, the Bank issued a notice of sale of the same dated May 3, 2018. They referred court to **'NT 6'** attached to their affidavit.
- vii) That the actions and omissions of the Bank are inconsistent with its treating the suit property as a security only.

Reply by the Respondent (the gist):

[10] In an affidavit in reply, the Bank contends;

- i) That the allegations by the Applicants that it abandoned the suit property are unfounded.
- ii) That the valuation report – **'NT4'** makes reference to the condition of the suit property as being: **'in a good state of repair and maintenance,** and attributes the devaluation of the suit property

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primarily due to the sluggish effective demand of property in the market, and not because of the false allegations of vandalism.

- iii) That the Applicants have at all material times requested for time to repay the loan facility, and have failed to meet their repayment obligations. The Bank relied on letters by the Applicants marked '**D, E, F & G**' to the affidavit in reply.
- iv) That the valuation report marked '**NT 5**' does not state that the suit property was vandalised.
- v) That the issuance of a notice of sale under the Mortgage Act is in accordance with the law, and was issued after allowing the Applicants time to redeem the suit property.
- vi) That despite being given an extension of time to pay, the Borrower M/s Dasawihi failed to honour the demands and statutory notices marked '**I, J & K**' served on them by the Bank.
- vii) That it would be grave injustice if the application is granted when the Bank is owed **UGX 367,039,162 (Three Hundred Sixty-Seven Million, Thirty-Nine Thousand, One Hundred and Sixty-Two Shillings only)**, as at May 3, 2018 with continued interest accrual.

Rejoinder by the Applicants:

[11] In their affidavit in rejoinder, the Applicants further contend;

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- i) That the valuation reports of 2015 and 2016 state that the suit property was in good repair and maintenance. That it is only after the Bank had taken control over the suit property, that it drastically lost value. They referred court to their valuation report – ‘NT 5’ of 2018.
- ii) That the suit property was wasted or mishandled by the Bank, and that some properties that were stolen and vandalised had to be repaired. That specifically: a water meter, the windows, doors, the main gate, the floor the boundary fence, inside and outer walls, and electrical wiring. They referred court to a Police reference letter dated September 9, 2017 marked ‘B’ to their affidavit, and to page 7 of their report marked ‘NT 5’.
- iii) That it is unfair for the Bank to reclaim the suit property without compensating the Applicants for the expenses they incurred on account of the Bank’s failure to take care of the suit property.

Issues:

[12] Two issues emerge for the Court’s determination:

1. **Whether the Bank breached her obligations as a mortgagee under the Mortgage Act as alleged? And if so,**
2. **Whether the Applicants are entitled to the remedies sought?**

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Submissions of Counsel:

[13] Learned Counsel for each party filed their respective written submissions, that I have duly considered. For brevity, I will not reproduce their arguments here. I will only refer to them if, and or where necessary.

Analysis by Court on issues Nos. 1 and 2 jointly.

[14] The pertinent law governing this matter is **sections 20, 24 and 33 of the Mortgage Act**. These sections provide as follows:

Section 20 (d) & (e) provides that:

'Where the mortgagor is in default and does not comply with the notice served on him or her under section 19, the mortgagee may—

- (a) ...
- (b) ...
- (c) ...
- (d) enter into possession of the mortgaged land; or
- (e) sell the mortgaged land.

Section 24 (5) (a) provides that:

(5) A mortgagee in possession of any mortgaged land—

a) by occupation, shall be entitled to manage the land and take all the profits of the land, but is liable to the borrower for any act or omission by which the value of the land, or any building on, or other permanent improvement to the land is impaired or the mortgagor otherwise suffers loss;

(Underlining added).

Section 33 (a) provides that:

An application to the court for relief against the exercise by the mortgagee of any of the remedies referred to in section 20 may be made \_

- a) by the mortgagor
- b) ...

*Handwritten signature/initials*



- c) ...
- d) ...

- [15] In this matter, the alleged acts or omissions complained about by the Applicants, are that the Bank, as mortgagee in possession, neglected and subjected the suit property to vandalism, that allegedly caused extensive damage to the suit property and resultant loss to them.
- [16] I carefully studied and evaluated the affidavit evidence for and against this suit. I also carefully considered the submissions of both Counsel, and the law, and found as follows;
- [17] The period July 2015 to May 2018 is the period within which the Applicants assert that the suit property was vandalised while in the hands of the Bank. They have however, not shown to this court the exact dates that they say the suit property was in the hands of the Bank.
- [18] The valuation report '**NT 3**' dated July 2, 2015 shows that as at that date, the suit property was owner occupied. To wit: occupied by the Applicants themselves. The report – '**NT 4**' of September 20, 2016 shows that at the time of that report, the suit property was vacant. While the report of May 2018 – '**NT 5**' is silent on that aspect. '**NT 5**' only shows that as at May 2018, the suit property was undergoing general repairs and renovations on what were termed as: '*outstanding works*' listed therein.
- [19] Similarly, '**NT 3**' and '**NT 4**' both show that the suit property was in good repair and maintenance. And, **NT 5** shows that the suit property was

*Resubmitted 7/3*



undergoing general repairs and renovation. The questions that this court has been left to ponder over are; **'when was the suit property allegedly vandalised'? 'When did the suit property move from the occupation by its owners into the hands of the Bank, and back to its owners'?**

[20] In his submissions, learned Counsel for the Applicant lamely argues that the valuation reports adduced by the Applicants show that the value of the suit property depreciated at the time the Mortgagee was in possession.

[21] **Again that begs the question: 'when was the mortgagee Bank in possession'?**

[22] The Police report of September 9, 2017 suggests that Okidi Easter: the 1<sup>st</sup> Applicant, reported to the Police the loss of a water meter No. 3531104.

[23] Does that Police report then suggest the time of the alleged vandalism as September 2017? Does it also suggest the alleged vandalised item (s) to constitutes a water meter? It is not clear.

[24] That notwithstanding, the Applicants have also failed to demonstrate to court that the said '*outstanding works*' listed in their report – **NT 5**, were works that were undertaken as a result of the alleged vandalism. The relevant part of that report states; I quote:

'At the date of inspection, the property was undergoing general repairs and renovations. The workmanship appears to be of satisfactory standard. The outstanding works include:

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- Replacing the windows and door shutters
- Finishing the floors

*Resubmitted 7/3*

- [25] They failed to demonstrate that the said '*outstanding works*' were not merely routine renovation works due to fair wear and tear of the suit property over the effluxion of time. They ought to have adduced cogent evidence to show that prior to the commencement of the said works, the suit property had been extensively damaged as alleged. They did not.
- [26] As it were, what was presented to court, is a Local Council (LC) Chairman's letter dated March 4, 2019 to which they attached and relied on the said Police report about a missing water metre No. 3531104. They also relied on the said valuation reports '**NT 3, NT 4 & NT 5**'
- [27] It is my view, that the said valuation reports, the LC letter and the said Police report, fall far short of drawing the critical line between fair wear and tear of the suit property, and the alleged deliberate extensive damage.
- [28] This court has found no basis to interpret the variance in values stated in the said reports as evidence of any damage to the suit property. To wit: the suit property was valued at **UGX. 325,000,000/=** in 2015 as per **NT 3**, **UGX. 280,000,000/=** in 2016 as per **NT 4**, and **UGX. 270,000,000/=** in 2018 as per **NT 5**.

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- [29] The authors (valuers) of one of the reports (NT 4), attributed the variance in values to **'sluggish effective demand prevailing in the property market due to the limited liquidity in the financial sector at the time'**. No other factor was rendered by the reports to point court to a further explanation. The allegations by the Applicants are therefore without basis.
- [30] In sum, the Applicants have failed to discharge the onus on them to prove their allegations as required under sections 101 – 103 of the Evidence Act<sup>5</sup>. Such failure also extends to how they arrived at the alleged expenditure of **UGX. 70M** on the suit property. Could that figure be the value of the missing Water Metre No. 3531104?
- [31] **Issues Nos. 1 and 2 are accordingly answered in the negative. It has not been shown that the Bank breached her obligations as a mortgagee under the Mortgage Act.**

Decision of Court:

- [32] In the result, this suit fails and is dismissed with costs to the Respondent Bank. (Sec. 27 of the Civil Procedure Act, applied).

I so Order,



**P. BASAZA - WASSWA**  
**JUDGE**

March 7, 2024

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<sup>5</sup> Cap. 6 of the Laws of Uganda.



Judgment delivered electronically via email to the parties and uploaded on the Judiciary ECCMIS Portal. Email to: [clynnah@gmail.com](mailto:clynnah@gmail.com) and [balpeinnocent@gmail.com](mailto:balpeinnocent@gmail.com) for the Applicants, and to [watwine@amberadvocates.com](mailto:watwine@amberadvocates.com), [info@amberadvocates.com](mailto:info@amberadvocates.com) and [mssenoga @dfcugroup.com](mailto:mssenoga@dfcugroup.com) and [winnieokidi@gmail.com](mailto:winnieokidi@gmail.com) for the Respondents.