THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM:HON. JUSTICE S.G.ENGWAU, JA

HON. JUSTICE A. TWINOMUJUNI, JA

HON. JUSTICE S.B.K. KAVUMA, JA

EDWARD MUSISI::APPELLANT

VERSUS

1. **HOUSING FINANCE CO. (U) LTD**
2. **SPEEDWAY AUCTIONEERS::::::::::::::::::::::::::::::::RESPONDENTS**

CIVIL APPEAL NO. 25 OF 2004

(Appeal arising from the judgment of the High court of Uganda, at Kampala dated 27th Nov. 2003 in Civil suit No. 27 of 2002.)

JUDGMENT OF THE COURT.

This is an appeal against the judgment of the High Court of Uganda, (R.O Okumu Wengi J,) in which the court dismissed the appellant's suit.

Background

The background to this appeal is as follows;

The appellant borrowed a sum of shs. 40.000.000/= from the 1st respondent in 1995 repayable with interest in ten years. The appellant mortgaged his property comprised in Kibuga Block 28 plot No. 256 situate at Makerere Kavule to the 1st respondent. At times, the appellant would be in arrears on his loan repayments and at one time the 1st respondent instructed the 2nd respondent to sell the appellant's said property. The property was advertised by the 1st respondent.

On the 18/01/2002, the date set for the sale of the property in the advertisements, the appellant made some payments into the bank account he held with the 1st respondent. Those payments were duly accepted and receipted by officials of the 1st respondent.

The appellant, accompanied by one, Kaggwa, P.W.2, then rushed to the offices of the 2nd respondent. They took a letter together with the receipts from the 1st respondent showing the appellant had paid shs 3.300.000. The Appellant presented the receipts to the 2nd respondent stating that he had paid up all the money that was due and owing from him to the 1st respondent. The appellant demanded that his property should not be sold. The 2nd respondent declined to take the letter and the receipts and referred them to one, Micheal Mugabi, DW1, the legal officer of the 1st respondent who was at the auction. Mugabi rejected the said letter and receipts. He said the auctioning of the appellant's property would go on and that the buyer, one Dorothy Nabatanzi from Med-Net was already at the auction and ready to pay. The appellant then put the letter and the receipts at the office table in the 2nd respondents' office.

DW1, soon thereafter, instructed the 2nd respondent to sell the property. The 2nd respondent complied. The property was said to have been sold to the appellant's tenant M/s Med-Net at shs 170,000,000/=. The appellant objected and soon thereafter instructed his counsel to file a suit against the 1st and 2nd respondents challenging the sale of his property. The trial judge dismissed the suit hence this appeal.

Grounds of appeal

There are three grounds of appeal namely:

1. **That the learned trial judge erred in law and fact in finding that at the time of the sale of the mortgaged property comprised in block 28, plot 256 Makerere, the appellant was in arrears by default whereby the entire loan fell due.**
2. **That the learned trial judge erred in law and fact in holding that the sale of the mortgaged property was lawful.**
3. **That the learned judge erred in law and fact in failing to consider the equitable principle of redemption.**

Representation

At the hearing of the appeal the appellant was represented by Mr. Macdosman Kabega while Mr. Nangwala appeared for the respondents.

Submissions by counsel

Both counsel, with the leave of court, filed written submissions.

Submissions by counsel for the appellant

Counsel handled grounds 1 and 2 together. He submitted that the learned trial judge erroneously found that at the time of the sale of the property, the appellant was in arrears by default whereby the entire loan fell due. Counsel submitted, further, that the final bank statement obtained by the appellant from the 1st respondent on 31st Dec 2001 showed that the appellant owed the 1st respondent an outstanding sum of shs 4.744.316.76 only which he accordingly paid up before the sale. In his view, there was no default by the appellant and, the sale of his property on the 18th January 2002 was unlawful. He prayed court to allow grounds 1 and 2.

Submitting on ground 3, counsel pointed out that the respondents relied on clauses 11.1 and 12.2 in the mortgage deed to fetter the appellants' inviolable equity of redemption. This could not be taken away by any provision in the mortgage deed. Where the contractual right of redemption is illusory, counsel contended, equity grants relief by allowing redemption. He relied on **Knights Bridge estates Trust Ltd vs Byrne (1939) 1ch.441.** He prayed court to allow ground of appeal No.3 and the appeal and grant the appellant's prayers.

Submissions by counsel for the respondent

Counsel supported the trial judges' findings. On grounds, 1and 2, he submitted that at all the material time, the relationship between the parties was governed by a registered legal mortgage. Counsel submitted that at all the material time, the appellant was in default. He contended that all along the 1st respondent wrote to the appellant reminding him that he was in arrears. Besides, Exhs D20 and D21, which were statements on the appellants account, show that the appellant was always in areas. On exhibits D3, D4 and D5 having been wrongly addressed, counsel contended, that did not invalidate the sale. He prayed court to find in the respondent's favour on grounds 1and 2.

On ground 3, counsel submitted that the appellant was given adequate notice and time to exercise his equity of redemption but failed to do so. According to him, the appellant was not justified in asking the trial judge to set aside the sale of the property since it had already attracted interests of a third party which had bought the same. Counsel asked court to pay attention to clause 7.3 of the mortgage deed. He prayed court to find in favour of the respondents on this ground an finally dismiss the appeal with costs.

The issues.

The following 3 issues emerge from the above grounds of appeal.

1. **Whether on 18th Jan 2010 the appellant was in default of any of his payments on the mortgage to warrant a sale of the mortgaged property.**
2. **Whether the sale of the appellant's property on the 18th January 2002 was lawful**
3. **Whether the trial judge property considered the appellants right of the equity of redemption**.

Duty of Court

It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions bearing in mind, however, that it did not see the witnesses testify.

See **Rule 30 of the Judicature (court of Appeal Rules) Directions S.I.13-10**. **Pandya VR [1957] EA 336, Okeno V Republic [1972] E.A 32 and Kifamunte Henry V Uganda SCCA NO. 10 of 1997** (unreported).

Courts resolution of the issues

We have carefully studied and considered the submissions of both counsel on the above three issues. We shall consider and resolve the issues seriatim.

Issue I

The gist of this issue is whether the appellant was in default of any of his mortgage repayments that justified the sale of his property on the 18th January 2002. The trial judge had the following to say in relation to this.

> ***"From the above evidence I can find and hold that at the time of the sale the plaintiff was in arrears by default whereby the entire loan fell due. I am also satisfied that he was aware no notice, advertisement or otherwise that he was required to repay the outstanding loan lest the security would be realized. There is no doubt that he was quite a difficult borrower who at one time earlier secured court orders to resist the loan recovery and at the time of sale, he not only did attempt to make an inadequate and ineffective payment but placed a caveat on his property held by the bank under a mortgage. I would say right away that the stale cheque was itself of little consequence as it could not have recovered his default status and no money was recovered from it. I would therefore answer the 1st issue in the affirmative."(sic)***

We have considerable difficulty with the above finding of the trial judge. Much of it is not borne out by the evidence on record.

In his evidence, the appellant (P.W.1) testified to court that he was provided with a final bank statement by the 1st respondent dated the 31st December 2001. This statement indicated the total amount due and owing from him to the 1st respondent as Shs.4,744.316.76 which he paid and that his account was in credit at the time of the sale.

The appellant rejected as false the 1st respondent's claim that at the time of the sale of his property the amount due from him to the 1st respondent was over shs.31,000,000/= He consistently and emphatically testified that the statement produced to him during cross-examination in support of that claim was a forgery. He emphasized that by sale time on 18th Jan 2002 he had paid up a total of shs.5,300,000/=.

On a careful perusal of Exhibit P.5 and review of the relevant evidence on record on this matter, including the final bank statement dated the 31/12/001, we are persuaded that the appellant owed to the 1st respondent shs.4.744.316.76 and not shs.31,000,000 as of the 18th Jan 2002.

We also find from the evidence on record that the appellant had paid to the 1st respondent a sum of shs.3,300,000/= on the morning of the 18th Jan 2002. This was in addition to shs.2,000,000/= the appellant had paid to the 1st respondent earlier on in the month of January 2002. The appellant presented to the 2nd respondent and a representative of the 1st respondent, DW1, the evidence of such payment at the offices of the 2nd respondent, well before 10.00 am on the 18th January 2002 and before the auctioneer's hammer fell. We find that this amount was more than enough to cover the appellants' arrears as of the date of and before the sale. We find clause 7.2 of the mortgage deed very instructive on the situation obtaining at that time. It provides:

> **7.2** ***"The receipt of the company or any of its officers for any money paid to it by virtue of this mortgage shall effectually discharge the person paying the same there from and from being concerned to see to the application thereof."***

We find that the receipt of shs 5,300,000/= by the 1st respondent's officials before the sale of the property on 18/01/2002 was a waiver by conduct by the 2nd respondent of its right to sell the appellants property by reason of his earlier defaults in his loan repayments. I t also effectually discharged him from any liability to the 1st respondent. The fact that the cheque for shs 2,680,000/= was returned to the 1st respondent unpaid for being stale cannot work against the appellant. The cheque became stale in the hands of the 1st respondent, a financial institution of great repute, which kept it without presenting the same for payment. The appellant was, therefore, not in default of any sums of money payable to the 1st respondent on the mortgage the appellant had with it. We resolve issue one in the negative.

Issue 2

The gist of this issue is whether the trial judge erred when he found that the sale of the appellants property was lawful.

The trial judge had this to say with regard to this issue.

> ***"On the sale, the evidence is such that it proceeded under the mortgage and conditions for it were justified. There were a few problems with the sale documentation but the sale itself could not have been set aside by the Plaintiff's furtive payments on the morning of the sale. First the money was inadequate for the sums due. Secondly, the payment was not effective. The sale had been fully announced and was conducted by public auction, notwithstanding that a known tenant bought the property in the sale. Non stamping of the sale agreement was also in consequential given that the transfer of the property was duly executed and stamp duty would be paid under it. Thus even if I excluded the agreement of sale due to no stamping and failure to endorse on it its author or drawer, the auction had proceeded and a transfer was made. Some of the inconsistencies in the auctioneer's documents while indicating that a sale had been indeed executed, do not go to the root of rescinding the sale itself. In any case a dispute could only arise on these documents as between the seller (the Defendant) – on the one hand, and the buyer on the other hand) provided that as between the mortgagor and mortgagee the sale to release the security was warranted and the sale was lawful. I so find and hold thus answering the second issue framed in the affirmative." (sic)***

With respect, our review of the evidence on record relevant to this issue does not support the trial judge's finding above.

We have covered some aspects of our concern here while resolving issue I above and we need not repeat them.

As the trial judge noted, the documentation of the sale had problems. In our view, these problems were fundamental. The sale agreement, the single piece of documentary evidence that would have provided the evidence in support of the sale bore no endorsement that stamp duty had been paid on it in accordance with the Stamps Act S42. It could not therefore be used in evidence. We find the trial judges' contention that the property was transferred and that stamp duty would have been paid speculative.

Neither a properly executed and stamped form of transfer nor a certificate of title was tendered in evidence. Further, there is no evidence on record that shs 17,000,000/= the deposit in respect of the purchase price, was ever paid by Med-Net. The cheque for shs 153,000,000/= whose value represented the alleged balance on the purchase price bears no evidence of it ever having been presented and paid.

The trial judge asserts that sale was duly announced and that it was by public auction. The law requires advertisement by the auctioneer. The 2nd respondent admitted in his evidence that he did not advertise the sale. It was the mortgagee who advertised it. Prior to the advertisement, the most vital statutory notice of foreclosure and the demand notices were, somehow, posted by the 1st respondent to the wrong address. This was admitted by DW1. The required statutory notice was, therefore, never served on the appellant.

The trial judge appears not to have been bothered that the property was stated to have been sold to a known tenant of the appellant M/s Med-Net. The appellant explained his concern. From a very early stage of the happenings about his property, he had learnt of connivance between this known purchaser, his tenant and the 1st respondent to deprive him of his property. The buyer would, according to the unchallenged evidence of the appellant, withhold from him vital information regarding the operations of his account and the tenancy between the two in areas where the 1st respondent showed interest. The 1st respondent had even advised the purchaser to bid for the appellant's property when advertised and this was well before the 1st respondent advertised it. This indicated prior common interest between the 1st respondent and the appellant's tenant to disposes the appellant of his property.

On the 18th Jan 2002 at the 2nd respondent's offices where the auction sale was conducted, it was only Med-Net who offered a bid for the property.. This was, at shs170,000,000/= of which shs17,000,000/= was supposed to be paid as deposit on the purchase price although no evidence of such payment is on record. Interestingly, the same property had been valued at shs300,000,000/= at the time the loan it secured was extended to the appellant. A proper and diligent auctioneer would have avoided to appear reckless in the sale transaction. He would have had to use approved skills in the art of auctioneering to protect the interests of both mortgagor and the mortgagee. What happened instead, as clearly brought out by the evidence of PW.1 and P.W.2 at the sale site, D.W.1, an employee of the mortgagee effectively took over the conduct of the auction.

In view of all this, we find that whether the property was lawfully sold and transferred or at all remains disproved.

We, therefore, resolve issue 2 in the affirmative.

Issue 3

The gist of this issue is whether the trial judge properly considered the appellant's right of the equity of redemption. The trial judge found that the appellant had lost his right of the equity of redemption at the time his property was auctioned. The sale, according to him, was in compliance with clauses 11.1 and 12.2 among others, of the mortgage deed. Clauses 11.1 and 12.2 provide:

> **11.1** ***"No granting of time or Indulgence of any variation of waiver or release of the terms hereof shall prejudice the strict enforcement of all or any of such terms by the Company against the Borrower as if such time indulgence variation waiver or release had not been made."***
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> **12.2** ***"The giving of time to the Borrower the neglect or forbearance of the company in requiring or enforcing the terms hereof as to payment of the***

moneys hereby secured or otherwise or any variation or other dealing between the Company and the Borrower shall not in any way prejudice or affect this security or the joint and several covenants of the Borrower and the Surety herein contained or deemed and as between the Company and the Surety the Surety is to be considered a principal debtor for all moneys and obligations secured hereby".

We have held above that by the time the sale of the appellant's property is stated to have taken place, the appellant had paid up all the monies due from him to the 1st respondent. He had been effectually discharged from any liability to the 1st respondent there from and the sale was unlawful. The trial judge was in error to assume that the applicant had lost his right of the equity of redemption. No event had occurred to justify the loss by the appellant of his right of the equity of redemption. Further, in so far as the above two clauses provide for denying the appellant his right of the equity of redemption even after he would have paid all the arrears due from him to the 1st respondent, those provisions would not be enforceable against the appellant in the circumstances of this case. We are fortified in this view by what Lindey M R said in **Stantley Vs Wilde [1899]2 cap.** 474. His Lordship stated.

"The principle is: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment of or discharge of such debt or obligation, any provision to the contrary notwithstanding…any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and

therefore void…. A "clog" or "fetter" is something inconsistent with the idea of "security".

This rule of equity is for the protection of a mortgagor against unscrupulous or unfair treatment by a mortgagee. It is amply summarized in the well known sentence ***"once a mortgage always a mortgage"***

The case of **Nurdin Bandali VS Lombak Tanganyika Ltd [1963] EA.304** cited to court and relied on by the respondents is distinguishable from the case before this court. The **Nurdin Badali** case (supra) arose out of a hire purchase agreement. The case before court arises from a mortgagor –mortgagee relationships. The two transactions are fundamentally different in law.

The 1st respondent could not, therefore, invoke clauses, 11.1 and 12.2 of the mortgage deed against the appellant. To allow clauses 7.3, 11.1and 12.2 (supra) to extinguish the appellants proprietary rights in his property would amount to placing a clog on the appellant's right of the equity of redemption. It would render the right illusory.

It was also contended for the respondents that the appellants' right of the equity of redemption was defeated because the property was sold to a 3rd party.

We are not persuaded by this line of argument in light of our earlier findings in this judgment. Further there is ample evidence of connivance between the 1st respondent and Med-Net over the intended deprivation of the appellant of his property. Med-Net was so closely connected with the irregularities that surrounded the disputed sale that even if it had purchased it, it could not claim to have bought it in good faith. It had notice of the irregularities in the conduct of 1st and 2nd respondents which culminated into the claimed sale of the appellants property.

We therefore find that had the learned trial judge properly considered all the above factors, he would not have found that the appellant had lost his right of the equity of redemption at the stated time of the sale of his property on 18th January 2002. We, therefore find in the negative on this issue.

In the final result, we allow this appeal. The sale of the appellant's property comprised in Block 28 plot 256 is set aside. We order that the appellant's proprietary rights in the said property be fully restored to him and his certificate of title be returned to him free from any encumbrance.

According to the uncontroverted evidence on record, before the purported sale of the appellant's house, he was renting it out to Ms Med-Net Ltd at a monthly rent of shs 1,200,000/=. Since January 2002, he has not received any income from his house. This is a period of 103 months. Taking into account all the circumstances of this case, the court further orders that the sum of shs 100,000,000/= be paid to the appellant in general damages with interest thereon at the rate of 12% p.a from the date of judgment till payment in full.

The appellant be paid costs both at this court and at the Court below.

We so order

Dated at Kampala this …**26th** …day of …**August**... 2010

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S.G.ENGWAU

JUSTICE OF APPEAL

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A.TWINOMUJUNI

JUSTICE OF APPEAL

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S.B.K. KAVUMA

JUSTICE OF APPEAL