

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL SUIT NO.14471999**

**NILE BANK LIMITED :::::::::::::::::::::::::::::: PLAINTIFF/APPLICANT**

**VERSUS**

**TRANSWAYS TRADING CO. LTD:::::::::::::::::::: RESPONDENT/DEFENDANT**

**BEFORE: HON. LADY JUSTICE M. S ARACH-AMOKO**

**JUDGMENT**

This suit was brought by an Originating Summons under Section 7 of 8 of the Mortgage Decree, Order 34 Rules 3A and 7 of the Civil Procedure Rules and Section 101 of the Civil Procedure Act for the determination of the following questions by this court:

1. whether the Defendant/Respondent is in breach of the covenant to pay under the equitable mortgage
  
2. whether amount is due and owing to the mortgage under the above said equitable mortgage
  
3. whether the Plaintiff/Applicant is entitled to release and enforce security under the mortgage by foreclosure and/or sale so as to recover the principal loan amount together with accumulated interest amounting to Shs .51,626,095.

The facts upon which the relief sought is founded are set forth in the affidavit of Mr. Godfrey Ziwa, the Plaintiff's Legal Officer sworn on the 6<sup>th</sup> December 1999 in support of the Originating Summons. Briefly they are that:-

Sometime in 1988 the Plaintiff Applicant advanced to the Defendant/Respondent a short term facility by way of overdraft upon the Defendant/Respondent presenting the Plaintiff/Applicant the properties comprised in Namirembe Block 8 Plot No.473 as security.

A certified copy of the Memorandum is attached.

The Respondent mortgaged property comprised in Namirembe Block 8 Plot 473 registered in the names of Godfrey Jacob Kawere Nkago, the said registered proprietor having executed a Power of Attorney in favour of the Respondent and Michael Kawalya. A certified copy of the Power of Attorney is attached as “B.”

The mortgage was registered on the 21.4.89 by way of lodging a caveat on the mortgaged property. A certified copy of the title Deed is annexed as ‘C’. The amount owing and outstanding on the Respondent’s account is Shs.51,626,095. A bank statement of Loan Account No.00681531 operated by the Respondent and a copy of the status of the interest on the said account are attached as ‘D’ and ‘E’.

That inspite of several reminders the Defendant/Respondent has failed, refused and/or neglected to settle the monies due and owing to the Plaintiff/Applicant in breach of the terms of the said facility. Copies of demand letters are attached as ‘F’ ‘G’ and ‘H’.

The Plaintiff/Applicant now prays court to grant the following orders: -

1. Payment of all the principal loan plus accumulated interest amounting to Shs.51,626, 095.
2. An order of foreclosure.
3. An order that the mortgaged land be offered for sale by the mortgage consequent upon the order of foreclosure.

4. Consequential and any further and other relief as the court may deem fit.
5. Costs of the suit.

Service of the originating summons on the Defendant was effected by substituted service in the New Vision Newspaper of Friday, 28<sup>th</sup> April, 2000 requiring the Defendant to appear personally or by an advocate on the 2<sup>nd</sup> June 2000 at 9 o'clock in the High Court in Kampala, if it desired to be heard upon the determination of the questions set out in the Originating Summons.

On the 2<sup>nd</sup> June 2000 when the matters was called for hearing, no one appeared for the Defendant/Respondent and the court proceeded to hear the Originating Summons ex parte under the provisions of Order 9 Rule 17(1) (a) of the Civil Procedure Rules.

Mr. David Mulira, learned counsel for the Plaintiff/Applicant presented the summons based on the affidavit of Ziwa and its annexure and prayed for the reliefs enumerated above.

I have carefully perused the summons and its annexures, and I heard the submission by Mr. Mulira.

In the absence of any evidence to the contrary, I make the following findings:

1. That the Defendant/Respondent operated Uganda shilling Account No.006815001 with the Plaintiff/Applicant Bank at Plot 22 Jinja Road, Kampala. The debit balance as at 1.1.99 was shillings 37,630,600. (Annexure 'D'). The accumulated interest between 1.7.997 and 26.10.999 is Shs.13.995,95. This makes a total of Shs.51,626,095.

2. That this amount remains outstanding despite demands. (Annexure 'F', 'G' and 'H').
  
3. The Defendant/Respondent secured the advances by depositing the Certificate of Title of Block 8 Plot 473, situated at Namirembe (Annexure 'C'). The registered proprietor of the said property one Godfrey Jacob Kawere Nkage granted a Power of Attorney to the Respondent dated 9/8/97 (Annexure 'B') permitting the Respondent and one Michael Kawalya to inter alia, borrow upon the security of the said land.
  
4. The Applicant lodged a caveat on the said property the vide Instrument No.1341509 on the 21.4.89. This created an equitable mortgage on the property.

From the above findings it can safely be concluded that the Respondent has defaulted in repayment of the loan and is therefore in breach of the contract to pay and the Applicant is thus entitled to the remedies sought. Under Section 1 of the Mortgage Decree, No.17 of 1974 in case of the failure of performance by a mortgager, the mortgagee is entitled to sue the mortgagor or to realize his security in a manner provided in the Decree. Under Section 7 of the Decree, the mortgagee may apply to court to foreclose the right of the mortgagor to redeem the mortgaged land any time after the breach of covenant to pay. The Court is thereupon obliged to determine the amount due, and may fix a date not exceeding six months from the date of failure to pay within which the mortgagor shall pay the amount due. If the mortgagor fails to pay on the date fixed by the court, then the court shall order that the mortgagor be foreclosed of his right to redeem the mortgaged land and subsequently sell the mortgaged property consequent upon an order of foreclosure.

The right to sue can be exercised cumulatively with the right to sell.

In conclusion therefore, having found as I have above, I answer the questions as follows:-

1. The Defendant/Respondent is in breach of the covenant to pay under an equitable mortgage.
2. The amount due and owing the mortgage is Shs .51,626,095.
3. The Plaintiff/Applicant is entitled to realise and enforce the security under the mortgage by foreclosure and/or sale to recover the principal loan amount together with accumulated interest amounting to Shs.51,626,095.

And I make the following order:-

1. The Defendant/Respondent shall pay all the principal loan plus interest amounting to Shs.51,626,095 within 30 days of this order but not later than 30 August 2000.
2. If the Defendant/Respondent fails to pay, then the Defendant/Respondent (mortgagor) shall be foreclosed of his right to redeem the mortgaged property composed in Namirembe Block 8 Plot 473 forthwith and the land shall be offered for sale consequent upon the order of foreclosure in accordance with the Provisions of Section 8 of the Mortgage Decree of 1974.
3. The Respondent/Defendant shall pay the costs of this suit.

**M. S. Arach-Amoko,**  
**JUDGE.**

**12.7.2000.**

Ruling delivered in Court.

Present:

Mr. Mulira for Applicant/Plaintiff.

Mr. Okuni Charles - Court clerk.

M. S. Arach-Amoko

JUDGE.

12.7.2000.