

lodged a caveat to property comprised in Buyaga Block 48 Plot 93 at Kisweka measuring approximately 0.083 hectares.

The Plaintiff later discovered that the disputed land has been advertised by the Bank for sale in the *Daily Monitor* of 13.2.2011 by the 3rd Defendant on behalf of the 1st Defendant. He immediately filed a suit and obtained an interim order restraining the 1st Defendant from selling and/or transferring the suit land pending the disposal of the dispute by this court. The 1st Defendant filed a Written Statement of Defence averring that the property had been sold to the 4th Defendant on 14.3.2011. The Plaintiff then filed Civil Suit No. 29 of 2011 against the bank, the mortgagor, auctioneer and buyer as 1st, 2nd, 3rd and 4th Defendants respectively. The two suits were later consolidated and heard as one.

In its written statement of defence filed on 30.3.2011, the 1st Defendant averred that the second defendant on the 14th day of September 2010 applied for a loan and was granted a loan facility of **UGX. 82,000,000/= (Eighty-Two Million Uganda Shillings Only)** and he pledged to the 1st defendant security vide a land title comprised in Buyaga Block 48 Plot 93 at Kisweka measuring approximately 0.083 hectares which, was registered in his name and the 1st defendant registered a valid mortgage on it. That the 2nd defendant defaulted on the loan repayment and the 1st Defendant exercised its right of selling the property as the mortgagee after advertising the same on 13th February 2011 and liquidated the security on 14th March 2011 by way of sale to the 4th Defendant. The 1st Defendant contended that the suit is misconceived and does not disclose a cause of action against the 1st Defendant. The 2nd and 3rd defendants did not file written statements of defence and this matter proceeded under Order 9 rule 10 of the Civil Procedure Rules SI 71-1 ex parte against them as though they had filed a defence.

The first and fourth Defendants denied the Plaintiff's allegation and their defence was that the suit property was registered in the name of the 2nd Defendant who pledged the suit property as security for a loan, failed to repay the loan and the Bank (first Defendant) sold the mortgaged property or the suit property to the 4th Defendant through the 3rd Defendant, its agent. It was the position of the 1st and 4th Defendants they were under no obligation to disclose any information to the Plaintiff as he was not the registered owner and/or mortgagor.

Representation:

The Plaintiff was represented by M/S Madibo Mafabi Advocates. The 1st defendant was represented by M/S Nambale, Nerima & Co. Advocates while the 4th defendant was represented by M/S Kahwa Kafuuzi Bwiruka & Co. Advocates.

Issues:

At the Scheduling Conference the following issues were agreed upon for determination by court,

1. Whether the sale of land comprised in Buyaga Block 48 Plot 93 at Kisweka by the 1st Defendant to the 4th Defendant was lawful?
2. Whether the Plaintiff has a right in land comprised in Buyaga Block 48 Plot 93 at Kisweka?
3. Whether the 1st Defendant is in contempt of court?
4. Whether the eviction of the Plaintiff from the land described as Buyaga Block 48 Plot 93 at Kisweka was lawful?
5. Whether the 2nd Defendant's name is liable for cancellation from the certificate of title for land described as Buyaga Block 48 Plot 93 at Kisweka?
6. What remedies are available to the parties

Whether the plaintiff has a right in the land comprised in Buyaga Block 48 Plot 93 at Kisweka?

It is not in dispute that the plaintiff was registered as the owner of the on 10.10.2007. It is also not in dispute that the plaintiff later transferred the suit land to his son, the 2nd Defendant on 3.4.2008. Furthermore, it is not in dispute that the 2nd defendant used the suit land as security for a loan from the 1st Defendant. Pursuant to the title deed, the first Defendant advanced a loan to the 2nd Defendant **Shs. 82,000,000/=** and later **Shs. 60,000,000/=** which were registered as a mortgage on 29.8.2008 and 13.5.2009, respectively. The Plaintiff also registered a caveat on the title deed to protect his interest on 17.3.2009.

As security for repayment, the 2nd Defendant pledged to the first Defendant the suit property. The 2nd defendant defaulted on the loan repayment, upon which, the first Defendant foreclosed and advertised the suit land for sale. The fourth Defendant purchased the property from the

first Defendant on 14.3.2011. The plaintiff secured an interim order stopping sale and/or transfer of the suit property, which was registered as an encumbrance on 7.07.2011. This is the evidence that is on the record and undisputed.

The question that must be answered is whether the plaintiff has got any rights in the suit land. The plaintiff, willingly and without coercion from any one including Centenary Rural Development Bank transferred title in the suit land to his son, the 2nd defendant, who became the owner of the property. Section 59 of the Registration of Titles Act provides that the certificate of title shall be conclusive evidence of title or specifically that the person named therein is the owner of the title. Of course, the title can be impeached under section 176 of the Registration of the Titles Act, where it is *inter alia* established that the title was procured through fraud. This is not the case in this matter because the evidence bears it out all, that the plaintiff willingly and without any coercion transferred his title to his son, the second defendant who became the owner of this property with full rights and obligations to deal with it.

I am mindful that as between the plaintiff and his son, there was an understanding that the son would revert the title back to the plaintiff within two years and to secure his rights in the property the plaintiff entered into a contract with the son, in which it was agreed that the son would transfer back the suit property into the names of the plaintiff within two years. However, the agreement, is only binding on the plaintiff and the second defendant and has no legal effect on the whole world including Centenary Rural Development Bank Limited, for the reason that the rest of the world is not privy to the contract and cannot be held responsible for its breach. In **Asante Aviation Limited vs. Star of Africa Air Charter Limited [2017] UGCOMMC125**, Justice Wangutusi observed that privity of contract is a legal doctrine that confers rights and imposes liabilities on only the parties to the agreement. This means that a third party cannot sue those that have entered into their contract because it does not have that clause, mutual or successive relationship to the same rights of property or power to enforce a term in the agreement.

In light of this analysis, the plaintiff cannot rely on the contract he made with his son, the second defendant to make the first defendant, the Bank, liable to him. The plaintiff has no interest whatsoever in the suit property, having willingly transferred it to his son, who became its registered owner without fraud and therefore does not have the locus standi to sue. This issue is therefore answered in the negative.

Whether the sale of land comprised in Buyaga Block 48 Plot 93 at Kisweka by the 1st Defendant to the 4th Defendant was lawful?

The plaintiff testified that he had an agreement in writing with his son the 2nd Defendant to transfer the suit property to him for 2 years to enable him secure a loan to recapitalise his business. After transfer of the suit property, the 2nd defendant pledged the property as security for a loan with the 1st Defendant. The plaintiff also caveated the suit property to protect his interest based on an agreement he had entered into with his son, the second defendant to transfer back his land within two years. Unknown to the plaintiff, his son defaulted on the loan and the property was advertised for sale. The plaintiff approached the 1st Defendant to avail him information regarding the outstanding balance to enable him off set it to redeem his property without success. He then filed a suit to protect his interest and secured an interim order stopping the bank from selling and/or transferring the suit property. None the less, the 1st Defendant sold the suit land during the pendency of the suit and transferred the suit property to the 4th defendant in contempt of the interim and temporary injunction orders issued by this court. Later he was evicted from the property and possession thereof handed to the 4th defendant.

DW4 Mathius Kazinda told Court the 2nd Defendant borrowed money from the 1st Defendant Bank. He did not comply with the repayment schedule and that the Bank after serving a demand note on the borrower, which he ignored, sold the mortgaged property at a public auction to the fourth Defendant on 14/3/2011. The fourth defendant Tinka Joseph, testified that he learnt that the property was on sale from newspapers. He bought the property, and after which an agreement was executed whereupon he took possession of the property and the same was transferred to him. The Plaintiff's contention is that the Bank should have informed him of the outstanding balance the second Defendant owed under the mortgage so that he could pay off the loan and redeem his property. It is on this basis that he contested the sale of the property to the fourth Defendant.

Counsel for the plaintiff attacked the process that led to the fourth Defendant's purchase of the suit property and transfer namely;

- (i) That no demand Notice was served on the defaulting borrower.

- (ii) That the first Defendant did not notify the Plaintiff of the default or the intended sale of the mortgaged property and this rendered the sale unlawful since he had an interest in the property, which had been registered on the title by way of a caveat.
- (iii) That the transfer to the fourth Defendant was barred by the provisions of Section 77 of Registration of Titles Act because it was affected by the Plaintiff's caveat lodged on 17/03/2009
- (iv) That the transfer to the fourth Defendant was barred by the court order the release of mortgage, and lodgement of transfer forms in favour of the 4th Defendant was in contempt of a court order restraining the first Defendant from selling and/or transferring the suit property.

The first Defendant's submissions repeat the evidence which I have already summarised above and relied on Section 116 of Registration of Titles Act (RTA)

From the evidence on the record and arguments of the parties, a number of sub issues arise out of the arguments by the parties. The sub issues are:

1. Whether the Bank served notice of default on the second defendant and relatedly whether the notice was mandatory?
2. Whether the Bank owed a duty to the plaintiff to notify him of the 2nd defendant's default of the loan?
3. Whether the Bank was guilty of contempt of court in selling the suit property to the 4th defendant?

With regard, to the obligation to give notice of default, section 19(1) of the Mortgage Act provides that where money is secured by a mortgage under this Act is made payable on demand, a demand in writing shall create a default in payment. Section 19(3) of the Mortgage Act provides the format of the Notice in Default. Section 117 of the Registration of Titles Act which is equally applicable to this case, provides that:

“Where money secured by a mortgage under this Act is made payable on demand, a 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.”

From the reading of the law and the case of **Alice Norah Mukasa vs Centenary Rural Development Ltd & Another, HCCS NO 77 OF 2010**, the bank is obliged to serve notice on the mortgagee as part of the process leading to foreclosure. In this case, the Bank served notice of default on the second defendant, who chose not to respond or remedy the situation and I cannot therefore blame it for the second defendant's defaults.

Did the Bank owe a duty to disclose to the plaintiff that the second defendant had defaulted on the loan? A duty is either created by contract or the law and cannot therefore be assumed or implied regardless of whether there might be some reasons that appear compelling. In this case, there was no contract between the Bank and the Plaintiff. The bank was not party to the contract between the plaintiff and the second defendant. The Plaintiff was also not a guarantor to the second defendant's loan to the Bank. That being the case, the plaintiff cannot create obligations between himself and the Bank for which the Bank can be made liable. If the plaintiff had wanted to create obligations between himself and the Bank, he would have guaranteed the loan and this would have created a duty on the Bank to notify him upon default by the second defendant to pay the loan. This principle was well laid out in **Alice Norah Mukasa v Centenary Rural Development Bank Ltd & Another, HCCS NO 77 OF 2010** where it was held that:

“Failure to call upon the guarantor to pay the outstanding sums and selling her property without first issuing a demand notice and notice of intention to foreclose amounted to withholding material information from her which was an act done in bad faith and the whole process of sale became unlawful”

Given that the plaintiff was not a guarantor to the second defendant's loan/ mortgage, there was no obligation on the Bank to notify the plaintiff of the second defendant's default and the fact that the plaintiff requested the Bank not to sell the property, does not create any obligations between him and the Bank as he was a stranger to the mortgage.

Whether the Bank was guilty of contempt of court in selling the suit property to the 4th defendant?

The Plaintiff impeached the interest of the fourth Defendant on the following grounds;

- a) The first Defendant selling the property without serving statutory Notice upon the borrower, guarantors and the plaintiff as required by law. Failure to comply with the statutory provisions governing sale of a defaulter's security renders the sale unlawful.
- b) The sale and transfer of the suit property in disregard of the plaintiff's caveat and court order stopping sale and/or transfer of the suit property.

The Bank on its part contended that the sale was lawful.

Section 29 of the Mortgage Act protects the rights of the purchaser and provides as follows:

“A purchaser in a sale effected by a mortgage acquires good title except in a case of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which the purchaser has actual or constructive notice”.

The 4th defendant bought the suit property after the 1st defendant, gave statutory notice to the 2nd defendant, who never responded. Upon failure to settle the mortgage, the Bank foreclosed the mortgage and sold the property after a public auction, which was open to the whole world including the plaintiff if he wished to retrieve his former property. It was contended by the plaintiff that the Bank sold the suit property in breach of a court order stopping the sale. The record, however, shows that the court order stopping the sale, was obtained after the sale had taken place. Therefore, in the absence of fraud or any illegalities, the fourth defendant has good title to the suit property and is protected by section 29 of the Mortgage Act. In case the suit property is not registered in the 4th defendant's names, the Commissioner for Land Registration is hereby directed to register him as the proprietor of the suit land.

Before taking leave of this matter, I have to consider the implications of the plaintiff's caveat which was lodged on the title of the suit property on the sale of the suit property to the fourth defendant. It is not contested that before the sale, the Plaintiff had lodged a caveat on the property to protect his interest. Any dealing in the property had to take into account the interest of the plaintiff as a caveator. But that in as far as this matter goes. From the evidence, the plaintiff testified that he caveated the suit property to protect his interest in the land. Caveats, are not just simple encumbrances that one can lodge as they so wish. Caveats are lodged to protect legitimate interest that one may have in the property. In this case, the

plaintiff had no legitimate interest to protect in the suit property because he unequivocally transferred the suit property to his son and his son became the registered owner of this property as against the whole world and his interest in the property is protected by section 59 of the Registration of Titles Act. Therefore, the plaintiff acted in bad faith when he caveated the suit property to defeat the interests of the Bank under the pretext of extending the operation of the contract he had entered into with his son to the Bank. As I observed above, if the plaintiff had wanted to protect the suit property, he would have offered himself as a guarantor to the mortgage and this would have given him a front seat in ensuring that the property was not sold in case the son defaulted on the two loans.

May I emphasise that the law cannot sanction conduct of people, like the plaintiff, who hide behind caveats to defeat the interest of mortgagors because if the law were to do so, then the entire credit industry would be put in disrepute as no sane person or bank would be interested in either lending against such properties or buying such property for the fear that their title would be impeached or they would have challenges in realising the security after foreclosure. The credit industry is so important to the wellbeing of the society that it deserves some level of protection against people using technicalities to beat the system to their advantage. In conclusion, the Bank did not act in violation of the plaintiff's unworthy caveat when it sold the suit property to the 4th defendant.

In conclusion, the sale of the suit property by the first defendant, to the fourth defendant was therefore, lawful.

Whether the 1st Defendant is in contempt of court?

The 1st defendant is not in contempt of the court order stopping it from selling the suit property, since the exparte order stopping the sale was served on the Bank after the sale of the suit property to the fourth defendant.

Whether the eviction of the Plaintiff from the land described as Buyaga Block 48 Plot 93 at Kisweka was lawful?

The court has found that the plaintiff had no interest in the suit property having transferred it to the second defendant, who, mortgaged it and lost the same when he failed to pay the loan.

This property was purchased by the fourth defendant who obtained a good title to it, which is protected by section 29 of the Mortgage Act. The eviction of the plaintiff from the suit property was therefore lawful.

Whether the 2nd Defendant's name is liable for cancellation from the certificate of title for land described as Buyaga Block 48 Plot 93 at Kisweka?

The fourth defendant lawfully bought the suit property and he is the legitimate owner of the property. I direct the Commissioner for Land Registration to register the fourth defendant as the proprietor of the suit property.

What remedies are available to the parties?

I have not found merit in the plaintiff's suit and I accordingly dismiss it with costs. The plaintiff will pay costs to the first and fourth defendants who entered appearance and participated in these proceedings. With regard to the caveat lodged by the plaintiff on the suit property, this caveat is hereby vacated as it is serving no legitimate purpose. I accordingly direct the Commissioner for Land Registration to vacate the caveat from the title of the suit property. Last but not least, the suit property will be registered in the names of the fourth defendant, who lawfully bought the property. The Commissioner Land Registration is accordingly directed to cause the transfer of the suit property into the names of the fourth defendant.

Decision

In the result, judgment is given with the following orders:

1. The plaintiff's suit is dismissed with costs to the first and fourth defendants;
2. The Commissioner Land Registration is ordered to vacate the plaintiff's caveats lodged on the suit property comprised in Buyaga Block 48 Plot 93;
3. The Commissioner Land Registration is directed to transfer the suit property comprised in Buyaga Block 48 Plot 93 into the names of the fourth defendant.

It is so ordered.



Gadenya Paul Wolimbwa

JUDGE

07/07/2020

DATE: 07/07/2020

Mr. Kafuzi for the 4th defendant

All the parties are absent

Court:

Judgment read and to be emailed to the parties.



Gadenya Paul Wolimbwa

JUDGE

07/07/2020

*Gadenya Paul Wolimbwa
Judge*