

THE REPUBLIC UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
CIVIL SUIT NO. 679 OF 2006

1. SAMUEL LUWERO }
2. LYDIA LUWERO }
PLAINTIFF

VS

1. HOUSING FINANCE BANK LIMITED }
2. SSEBUDDE ALBERT } **DEFENDANT**

BEFORE: HON JUSTICE WILSON MASALU MUSENE

JUDGMENT

The Plaintiffs Mr. Samuel Luwero and Lydia Luwero claim against the Defendants Housing Finance Bank Limited and Ssebudde Albert jointly and severally is for declaration that the sale of the Plaintiffs Mortgaged property comprised in LRV 3067 Folio 17 Plot 17 Mpanga close, Bugolobi, Kampala by the 1st Defendant to the 2nd Defendant was wrongful, general damages for breach of contract/deed of a mortgage by the 1st Defendant, a permanent injunction to restrain the Defendants and /or their Agents/ servants and others claiming under the from trespassing, evicting the occupants and disposing the plaintiffs of possession of the suit land and costs of the suit.

The brief facts of the case are that the Plaintiffs jointly and severally entered into an Agreement to borrow money by way of a single advance from the Defendant company of UGX 140,000,000=to enable them purchase property comprised in leasehold Register volume 3067 Folio 17 Plot 17 Mpanga close Bugolobi from a one Peter Mugenyi. And that by a mortgage Deed dated 11th day of April ,2003, between the Plaintiffs and the Defendant company, the

plaintiffs were given a single advance of UGX.140,000,000= with interest thereon ,at 14% per annum. Attached is a copy of the Mortgage Deed dated 11/04/2003.

The Plaintiffs executed a mortgage with the 1st Defendant dated 11th April, 2003 for a single advance of UGX. 140,000,000 and were to deposit an agreed monthly installment of UGX. 1,864,438 till payment in full within an agreed period of 15 (fifteen) years till payment in full of the sum secured with all accruing interest.

But on default of the mortgage terms by the Plaintiffs the suit properly was advertised for sale in the New Vision News paper of 5th December, 2005 by **Bemug Strict Auctioneers and Court Bailiffs** who were the 1st defendant's agents. And the 2nd Defendant tendered a successful bid which resulted in the execution of a sale agreement between the 1st and 2nd Defendants for the suit property at a consideration of UGX. 270,000.000. And the 2nd Defendant became the proprietor of the suit property under instrument No. 364715 of 24/03/2006.

This has greatly affected the plaintiff's interests on the suit land thus seeking court orders.

The 1st Defendant filed a defence denying the plaintiff's claim and the Plaintiffs breached the mortgage deed by persistently defaulting on the agreed monthly installment payment and that the 1st Defendant issued various reminders and a statutory notice accordingly and that the sale to the 2nd Defendant was in compliance with the terms of the mortgage.

The 2nd Defendant in his defence alleged that he lawfully purchased the suit property from the 1st Defendant and averred that he is a bonafide purchaser for value having bought the suit property on his part and raised a counter claim for loss of usage and mesne profits of the suit property.

The Plaintiffs filed a reply to the 2nd defendant's written statement of defence and counter claim denying the claims/defence of a bonafide purchaser for value without notice and any liability under the counter claim and prayed for its dismissal with costs.

At the scheduling conference, the following were issues;

- (i) Whether the plaintiff's defaulted on the mortgage payments?
- (ii) Whether the purported sale of the suit property to the 2nd Defendant was lawful?
- (iii) What remedies are available to the parties?

(iv) Whether the counter-claimant has any remedies?

M/S Nile law chambers Advocates & Solicitors appeared for the plaintiff, M/S Nangwala Rezida & Co. Advocates appeared for the 1st Defendant and M/S Nsubuga & Co. Advocates appeared for the 2nd defendant.

Both counsel for the Plaintiffs and Defendants filed written submissions. I have had the opportunity of reading through the written submissions on both sides and cases quoted. And for the purposes of this judgment, I shall summarize or deal with pertinent points raised by either side.

As far as the first issue of whether the plaintiffs defaulted on the mortgage payments. Counsel for the Plaintiff submitted that under Legal Mortgage, the Plaintiffs were obliged to pay to the 1st Defendant an agreed monthly installment of **UGX. 1,864,438** and were to be paid and deposited to the 1st Defendant's Bank by an agreed payment used for remittances and deductions on the two accounts that is, the loan and saving account operated by the Plaintiff in the 1st Defendant bank.

Counsel for the Plaintiffs further submitted that when the 1st Defendant demanded payments of alleged arrears in exhibit D1 and D2 of **UGX. 6,034,223.98**, the same was subsequently paid as reflected in the various statements of accounts issued by them but still the 1st Defendant reflected the deposits as debts instead of credits on the accounts per the remittances and deductions system for payment.

Counsel for the plaintiffs further submitted that at the time the 1st Defendant recalled the entire outstanding in the statutory notice dated 20th October, 2005, the Plaintiffs had remitted and transferred all the outstanding on the account as adjusted and varied by the 1st defendant.

Furthermore Counsel for the Plaintiffs submitted that the averment by the 1st Defendant that the plaintiffs were always in default for payment of monthly installments is false and untrue.

In reply Counsel for the 1st Defendant submitted that the said property was properly sold to the 2nd Defendant pursuant to the Legal Mortgage Exhibit P.2 and that the burden is on the plaintiffs to prove that they paid the covenanted installments in the manner agreed upon in the mortgage.

Counsel for the 1st Defendant further submitted that page 6 of the mortgage Deed evidences the mode of payment of each installment as follows;

“.....and shall pay such installment not later than the day on which such installment ought to be paid (as to which time is to be of the essence of the contract) until the total sum advanced by the company to the borrower with interest thereon shall be fully paid). The first such installments to be paid on the first day of the month next following the final advance date and each subsequent installment to be paid on the first day in every succeeding month.

Counsel for the 1st respondent further submitted that it was agreed in clause 4:1.1 of the mortgage that default in payment of any one or more of the installments constituted an act of default which would make all the monies under the mortgage repayment and for which the 1st Defendant would realize its security.

Documentary evidence show that the plaintiffs jointly and severally borrowed money to a tune of UGX.140, 000,000 from the 1st Defendant with interest thereon at 14% per annum and defaulted on the said mortgage payments. In the circumstances of the above case, the first issue is answered in the affirmative.

Issue No. 2 whether the statutory notice of foreclosure was properly served on the Plaintiff.

Counsel for the Plaintiffs submitted that, the 1st Defendant had a duty to issue and formerly serve upon the Plaintiffs a statutory Notice of foreclosure on default calling upon the borrower to settle the outstanding entire loan.

Counsel for the Plaintiff further submitted that, clause 9 and 3 of the Mortgage Deed provides that, “Any Notice herein under shall in addition to any provision as to service herein contained be deemed to be duly served, if in case of Notice to the company, it is posted to the company duly addressed to it at its registered postal address at the time of such Notice and proper postage thereon is prepaid.”

Counsel for the Plaintiffs further submitted that, the Agreement of purchase of the mortgaged property between the then owner and the Plaintiffs gave an address of their attorney a one George Ochola of P.O Box 417 Kampala and that the mortgage deed executed between the Plaintiffs and the 1st Defendant consistently maintained the said address as under the Recitals as

C/O George Eden Ochola P.O Box 417 Kampala. It is the Plaintiffs contention that the 1st Defendant did not ever at any material time ever use the address of P.O Box 71852 Kampala.

DWII, Eleanor Namaganda, the former Registry /Stores Clerk gave evidence that she dispatched a parcel addressed to the Plaintiffs and admitted while under cross-examination that she prepared the document dated 20th October, 2005 referred to as "Postage of Mails" Exhibit D8, that the document had been typed and printed and that she physically wrote in her handwriting the names and date on the document but did not read the information in the document she dispatched.

She further testified that, the said document that was allegedly used to dispatch the Statutory Notice to the Defendants is suspect in that it was never formerly received and does not indicate the Post Officer who received it save for a stamp that is also disputed.

But above all, dispatch of any document by prepaid post requires proof of delivery. It also requires a Certificate of Posting/Receipt of the document.

And it was submitted that on delivery of a registered item by prepaid post, the person to whom it is addressed or his authorized agent must give a written signature for it on an official form P23. The addressee or his authorized agent is also required to produce proof of valid identity. DWII, who allegedly dispatched the Statutory Notice, did not adduce any evidence of proof of delivery and receipt thereof by way of a certificate of Posting and any acknowledgement by the Recipients/addresses.

In the instant case, service of the Statutory Notice before the sale of the Mortgaged property was a covenant under the Mortgage Deed which the 1st Defendant breached and the Mortgagee was obliged to ensure that the mortgagor is served with the Statutory Notice and evidence of service obtained.

Counsel for the 1st Defendant submitted that exh. p3 was addressed to the Plaintiffs. It was contended by PW1 that the address furnished in the Mortgage and on the title was P.O Box 417 Kampala and that this was evidenced by PW1 during cross examination.

There was evidence from DW1 and DW2 that the Statutory Notice of foreclosure was properly served on the plaintiffs at the address he furnished and it was sent by registered post. Exh D 8

Therefore the 1st Defendant having served the Plaintiffs by posting the Statutory Notice of Foreclosure to the Address of the Plaintiffs P.O.BOX 71852 Kampala, and the Plaintiffs having neglected and/or ignored to respond to it, I find that the sale of mortgaged property was lawful. The 2nd issue is also answered in the affirmative.

Issue No 3: Whether the purported sale of the suit property to the 2nd Defendant was lawful?

Counsel for the plaintiffs submitted that the sale of the property to the 2nd Defendant was unlawful. Counsel further submitted that the 2nd Defendant did not do diligent search on the property he was to purchase from the Bank to establish the circumstances of sale and let alone his deliberate failure to inspect the property at the time of the purported sale.

Counsel for the Plaintiffs further submitted that the 2nd Defendant had sufficient notice of the fraudulent and illegal actions of the 1st Defendant's agents to wrongfully sale the mortgaged property on an alleged default of installment payments towards the mortgage/loan. Counsel cited the case **of Ssejjaka Nalima vs Rebecca Musoke, Supreme Court Civil Appeal No. 12 of 1982 in which Odok J.A (as he then was); observed;**

“While the burden of providing the case lies on the plaintiff, it is well settled that the onus of establishing the plea of a bonafide purchaser lies on the person who sets it up. It is a single plea and is not sufficiently made out by providing purchase for value and living to the plaintiff to prove notice if he can.”

Counsel for the Plaintiffs in reply to the counter-claim further submitted that they are not liable to the 2nd Defendant on the counter-claim as alleged and that DWIII, the 2nd Defendant rightly admitted during cross examination that he paid for the mortgaged property to the 1st Defendant in three installments payment completing it by 24th January, 2006 and that after completion, he was never handed vacant possession by either the court bailiff of the 1st Defendant.

Given the totality of the evidence on record in respect of the alleged sale and purchase of the Plaintiffs mortgaged property by the 1st Defendant to the 2nd defendant, it is submitted that the 2nd Defendant got involved in a dishonest dealing with direct knowledge of the Plaintiff's interest but pursued his sharp practice and dealing in land to deprive the person of the Plaintiff their

interest through fraudulent actions of all parties involved executed by the 1st Defendant's official agents.

Counsel for the 2nd Defendant in reply submitted that, the Mortgage Act, Cap 229, authorizes a mortgagee under **Section 10**, to sell a mortgaged property by public auction. And the said Act made no provision for the procedural steps to be taken by a sale other than by foreclosure. However, the 1st Defendant took the necessary steps to ensure that the sale was conducted in a fair and transparent manner.

In the instant case, the 1st Defendant placed an advertisement for the sale of the suit property in the New Vision newspaper on the **5th of December 2005 at page 23**, using **Bemug Strict Auctioneers And Court Bailiffs (Exh. 2D I)**. It is therefore assumed that the mortgagee's dual duty to sell in good faith and with reasonable care was fulfilled.

The 1st Defendant not only gave the required notice in a newspaper with wide circulation. The said advertisement was tendered in evidence as Ex. 2D 1. The suit property was sold to the 2nd Defendant who was the best bidder and who bought the property at a consideration of **UGX. 270,000/= (Two hundred and seventy thousand shillings)**. A copy of the sale agreement/transfer of land by mortgage was tendered as Ex. 2D 2 and sets out the consideration for the purchase as indicated above.

Counsel for 2nd Defendant further submitted that, notice of the sale was given to the occupants of the suit property by the court bailiffs under Exh. 2D 3 dated 28th March 2008. And on the basis of the transfer, the Defendant was able to get the land registered in his names as is borne out by the Certificate of Title tendered as Exh. 2D4.

Counsel for the 2nd Defendant prayed that, the 2nd Defendant's interest in the suit land is protected as he is a bona fide purchaser for value. In the case of **Nazarali Hassanali Sayan vs. Edward Mperese Nsubuga H.C.C.s No. 364 of 1993 Lady Justice Byamugisha** held that,

" ... a person who claims to be a bona fide purchaser will lose the protection of the law if there is evidence to 'show fraud on his or her part and that his or her title is liable for cancellation upon proof of fraud on the basis of which court can go beyond the fact of registration".

This means that a bona fide purchaser for value without notice has an absolute unqualified defence against the claims of any prior owner. Therefore the sale to the 2nd Defendant was undeniably lawful.

The Plaintiffs alleged during the trial of this case that the Defendants colluded and fraudulently transferred the suit land to the 2nd Defendant. They, however, did not adduce any proof of the said fraud. Section 102 of the Evidence Act, Cap 6, is to the effect that the burden of proof lies on the person who would fail if no evidence at all were given on either side. The Act goes on to assert under Section 103 that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. The Plaintiffs therefore had the duty to prove that the sale to the 2nd Defendant was tainted by the alleged fraud.

In the case of **Kampala Bottlers Ltd vs. Damanico (U) Ltd Wambuzi CJ** said at page 145 that,

"... 1 think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters".

Allegations of fraud must be strictly proved and the burden lies on the party that alleges fraud. The Plaintiffs ought to have adduced sufficient of the purported fraud. And in **Alenyo George William vs. DFCU and 4 others HCT-OO-CC-CS-697-20061 Kiryabwire J** held that, "Fraud must be strictly proved and the burden is heavier than that of the balance of probabilities generally applied in civil matters. The onus of proving fraud lies on the party who alleges that fraud."

In the present case, the Plaintiffs adduced no irrefutable proof of the alleged fraud and therefore cannot claim that the 2nd Defendant did not acquire good title.

Furthermore, the 2nd Defendant's duty is not to the mortgagor but to the 1st Defendant who sold him the property. In the instant case, the 2nd Defendant's duty was towards the 1st Defendant to fulfill the conditions of their sale agreement.

Therefore, not only did the 2nd Defendant acquire good title, he is not answerable to the Plaintiffs about the sale. The third issue is also answered in affirmative.

Issue No: 4 What remedies if any are available to the parties.

On this issue, the Plaintiff seeks remedies as prayed for in the plaint against both the 1st and the 2nd Defendants in respect of the wrongful and unlawful sale of the mortgaged property and under para 10 of the plaint, the Plaintiffs averred that in the alternative the 1st Defendant omitted and breached its duty to the Plaintiffs to act in good faith.

Further on this issue, Counsel for the Plaintiffs submitted that, the 1st Defendant irregularly and hurriedly sold the mortgaged property by under valuing it and thereby caused loss to the plaintiff.

Counsel for the Plaintiffs cited the case of **Moses Jim Jaggwe VS Standard Chartered Bank (U) Ltd HCCS no. 0375 of 2004**, where Justice Bamwine (as he then was) held that the Bank has a duty to act in good faith and take reasonable steps to sale mortgaged property at the true market value or the proper price prevailing at the time of sale.

Counsel for the plaintiff's further submitted that, one of the fundamental equitable principals for the enforcement of mortgages and the protection of borrowers is that the powers conferred on the mortgage must be exercised in good faith for the purpose of obtaining repayment and that the burden is on the mortgagee to show that it had taken all reasonable steps to obtain the best price reasonably obtainable on the sale of the property and that considering the evidence of PW1, the property was undervalued and hurriedly sold thereby denying him the right to redeem.

Counsel for the Plaintiffs further submitted that, DWIV gave evidence in respect of the valuation report stating the market value being UGX.275,000,000 and forced sale value being UGX.185,000,000. Therefore the evidence of DWIV and Exhibit D5 the valuation report not only suspect but quite untruthful in that DWIV was quite unsure when he visited the property and where he obtained telephone contacts of persons who led him to the property to carry out the valuation exercise.

The Plaintiffs prayed for the remedies as pleaded and that the counter claim be dismissed.

In reply Counsel for the 2nd Defendant submitted that the plaintiffs are not entitled to the remedies sought as they are no longer the proper owners of the suit land.

Given the totality of the evidence before me, I find that the 2nd Defendant had no notice of fraud in this case, through his agent in this transaction. The plaintiffs in this case are not entitled to any remedies.

Issue No.5 whether the counter claimant has any remedies

Counsel for the Defendant counter claimant submitted that the 2nd Defendant acquired good title to the suit land and is therefore entitled to the remedies prayed for;

- (i) A declaration that the suit property was lawfully sold to him, and therefore he is a bonafide purchaser for value with good title.
- (ii) Orders for vacant possession of the suit property.
- (iii) Damages for loss of usage and mesne profits of the suit property calculated at \$2,500 from July 2005 until vacant possession of the premises.
- (iv) General damages.
- (v) Interest on the decretal sum at court rate from the date of judgment.
- (vi) Costs of the suit.

In the instant case, since the 1st Defendant has never walked out of the contract to sell to the 2nd Defendant the Plaintiffs property, failure to take possession of the property by the 2nd Defendant was occasioned by the Plaintiffs. And the 2nd Defendant being a bonafide purchaser for value with a good title, I order that the 2nd Defendant possesses the suit land and each party to bear its cost.

In conclusion therefore, and in view of the findings of the court as summarized on all the issues, I do hereby enter judgment against the Plaintiffs and in favour of the Defendants as follows;

- (i) A declaration that the suit property was lawfully sold to the 2nd Defendant, and therefore he is a bonafide purchaser for value with good title.
- (ii) Orders for vacant possession of the suit property in favour of the 2nd Defendant.
- (iii) Each party to bear its costs.

Signed _____

WILSON MASALU MUSENE

JUDGE

12/11/2013