

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
(LAND DIVISION)

CIVIL SUIT NO.98 OF 2014

MUGOMBA JANET t/a MARY MAJOR.....PLAINTIFF

VERSUS

1. IMPERIAL BANK(UGANDA ) LIMITED.....DEFENDANTS

2. ARMSTRONG AUCTIONEERS

Before: Lady Justice Alexandra Nkonge Rugadya

Judgment:

Introduction:

The plaintiff filed this suit for a declaration that she was is entitled to equity of redemption; a declaration that the sale was premature and illegal, among others.

The 1<sup>st</sup> defendant counterclaimed for **Ugx 958,215, 067/=** and prayed for an order to sell the mortgaged properties.

Background

On 13<sup>th</sup> April, 2013 the plaintiff obtained a credit facility of **Ugx 850,000,000/=** from the 1<sup>st</sup> defendant bank and the two concluded a loan facility agreement. As a security for repayment the plaintiff mortgaged two of her properties comprised in **Kibuga Block12, plot 1641 Kampala and FRV 1097 Kyaggwe block 186, plot 110, Kasenge Mukono.**

The plaintiff defaulted in her payments and the 1<sup>st</sup> defendant bank took steps to recover the loan. The plaintiff filed this suit to challenge the intended sale. Upon the plaintiff's admission however of having received the principal sum, this court entered a judgment on admission on 7<sup>th</sup> October, 2014.

A number of issues however including the determination of interest and final balance payable by the plaintiff were left pending full trial. Court also directed a stay of execution of the orders pending the final disposal of the remaining issues.

On the date appointed for the hearing the plaintiff and her witnesses however did not appear despite the fact that service had been effected on 6<sup>th</sup> April, 2018 to *M/S Sam Kiwanuka & Co advocates*, her appointed counsel.

The firm had acknowledged service for the hearing date of 16<sup>th</sup> August, 2018 and by letter written on that same date addressed to court even requested to be furnished with typed and certified record of proceedings for that sitting.

The matter therefore proceeded *ex parte*.

**Issues:**

- 1) *Whether the plaintiff breached the loan agreement;*
- 2) *Whether the plaintiff was entitled to the equity of redemption;*
- 3) *Whether the intended sale was premature or illegal;*
- 4) *What remedies available to the parties.*

**Issue No.1 Whether the plaintiff breached the loan agreement; and**

**Issue No,2: Whether the plaintiff was entitled to the equity of redemption**

**Analysis of the law:**

Counsel for the 1<sup>st</sup> defendant bank submitted that the two parties had entered into a mortgage transaction for a sum of *Ugx 850,000,000/=*. That the plaintiff defaulted on her payments and that the outstanding balance, inclusive of interest as at 18<sup>th</sup> March, 2014 was *the Ugx 958,215, 067/=*. The bank had subsequently invoked remedies available to it under the *Mortgage Act, 2009*

issued a demand notice; a notice of default and a notice of sale of the mortgaged properties to the plaintiff.

The plaintiff while admitting in *paragraph 5 (a) and (b)* of her *plaint* and *paragraphs 4 and 5* of her reply to the WSD and counterclaim that the said sum had been advanced to her she questioned the manner in which the intended sale had been handled. She claimed that the loan had been recalled too soon and that she had paid more than **Ugx 34,000,000/=**

**Section 10 of the Contract Act, 2010** defines a contract in the terms below:

- 1) ... an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with intention to be legally bound;**
- 2) A contract may be oral or written or partly oral and partly written or may be implied from the conduct of the parties**

A breach of contract therefore occurs where one or both parties fail to fulfil the obligations imposed by the terms of the contract. (**Ronald Kasibante Vs Shell (U) Ltd, HCCS No.542 of 2006; [2008] ULR 690**).

It confers a right of action for damages to the injured party and entitles him or her to treat the contract as discharged if the other party renounces the contract or makes performance impossible or substantially fails to perform his promise: (**See: Ronald Kasibante Vs Shell (U) Ltd, HCCS No. 542 of 2006; [2008] ULR 690**).

The contract in this case was in form of a mortgage deed, **Exh. D2**, between the plaintiff and the 1<sup>st</sup> defendant involving two suit properties which were presented as security for the loan facility of **Ugx 850,000,000/=**, facts which were not in contention.

As decided cases have already established, offering property to a bank as security for repayment of a loan is made on the understanding that the property stands



the risk of being sold by the lender if there is default on the payment schedule and repayment of the debt secured. **Tonny Odora t/a TONI Enterprises, ABELA Construction Company Ltd & others vs DIAMOND TRUST BANK & Anor HCMA No. 679 of 2016.**

As per **Exh D1** the loan facility was repayable in 60 equal consecutive monthly instalments of both principal and interest, effective from date of disbursement of the facility, as per **clause 4 (I)**, with a lending rate of 24% per annum; and as per **clause 6**, with a default rate interest of 14% per annum.

In **clause 2 (vi,) (ix)** of **Exh D2** she also agreed to be bound by the requirement that the mortgage would not be discharged until full payment is received. She consented to making repayments in equal consecutive monthly instalments, which obligations she had however failed to meet according to the evidence of **DW1** supported by that of Ms Leila Nalule, the Manager Legal. (**DW2**). It was upon that basis that the 1<sup>st</sup> defendant bank had proceeded to recall the loan.

The plaintiff sought to exercise her right of redemption, to recover property before foreclosure sale by paying the principal, interest and other costs that are due. That right includes the right to reimburse the mortgagee and cure the default. **See: Black's Law Dictionary, 9<sup>th</sup> Edition at page 649).**

A mortgagor's equity of redemption essentially therefore allows the mortgagor, upon giving reasonable notice to the mortgagee of his or her intention to redeem the mortgage, even after the due date for repayment of the entire sum has passed. A mortgagor seeking an equitable relief however must also act fairly. (**Commercial Microfinance Ltd vs Davis Edgar Kayondo, HCCS No. 12/2005).**

**Section 8 (1) of the Mortgage Act, 2009 provides:**

**A mortgage shall have effect as a security only and shall not operate as a transfer of any interest or right in the land from the mortgagor to the mortgagee; but the mortgagee shall have, subject to this Act,**

*all the powers and remedies in case of default by the mortgagor and be subject to all the obligations conferred or implied in a transfer of an interest in land subject to redemption.*

Counsel for the 1<sup>st</sup> defendant bank in his submission referred to **Exh. D2, clause 4 (i) Page 8** thereof stating:

*The mortgagor is entitled to redeem this mortgage at any time on discharging the obligations hereby secured and the costs of such redemption.*

Counsel argued that instead of exercising her right to redeem the property the plaintiff instead chose to file this suit disputing the transaction. The interest on the loan however kept accumulating as per the loan statement and account statement and customer folio: **Exh D4, Exh D5, and Exh D6**, respectively. She accordingly lost her right to redeem the property.

For the defendant bank therefore to exercise its right to access the remedies available to it, it had to satisfy this court that the procedure as streamlined under the Act had been duly followed.

The remedy cannot be exercised in absence of evidence of fulfilment of the requirements of **section 19**. A default has to be established and time of 45 days given for rectification of the default.

**Section 19 (1)** provides that where money secured by a mortgage is made payable on demand, a demand in writing shall create a default in payment. Under **section 19 (2)** thereof where a mortgagor is in default of any obligation to pay the principal sum on demand or any interest or other relief payment or part of it under a mortgage, or in the fulfilment of any common condition, express or implied in the mortgage, the mortgagee may serve to the mortgagor notice in writing of the default and require the mortgagor to rectify the default within 45 working days.

Under **section 26(1)**, where mortgagor remains in default after expiry of the time provided for the rectification of the default stipulated in the notice served on him



under **section 19(3)** a mortgagee may exercise his or her power of sale of the mortgaged land. (See: ***In the Matter of Private Mailo Bugerere Block 79 plot 31land and Namatongonya and others vs WAYS KM UGANDA LTD, OS NO 11 OF 2014.***

In **section 26(2)** thereof, before the exercise of the power to sale the mortgaged property the mortgagee is required to serve a notice to sale and shall not proceed to sale until 21 working days from the date of the service of the notice to sale have lapsed.

Applying the above provisions in the present case, on 11<sup>th</sup> October, 2013 Mr. Tirunilayi Vaidyanathan, the head of credit and Ms Leila Nalule, the Manager Legal (**DW2**) signed a demand Notice, **Exh D3**. In that notice the plaintiff was informed that the payment of the loan was irregular and that the facility was over 58 days in arrears by **Ugx ; 93,879, 541/=**; a sum of **Ugx 905,525,277/=** was outstanding on the loan term as that date and interest of **Ugx 1,041, 974** would continue to accrue daily on the outstanding amount.

A warning was also issued that should she fail to pay the outstanding amount by 13<sup>th</sup> December 2013 the bank would proceed to realise the securities by which the credit facility had been secured. Also attached to that was the notice of default by the Manager Legal, dated same day.

From the testimony of **DW2**, on 23<sup>rd</sup> December 2013 a notice of intended sale of the mortgaged property was issued to the plaintiff (see: **Exh D 9**). It gave the plaintiff a further 21 working days' notice of the intended sale, in accordance with **section 26 of the Act.**, and an amount of **Ugx 952, 392, 127/=** was indicated as outstanding for payment. **Exh D 9** was duly acknowledged by Mr. Hamidu Gwampa, an agent of the plaintiff.

**Regulation 8 of the Mortgage Regulations 2012** requires the sale to be conducted through public auction to take place before the expiry of 21 work in days.

On 15<sup>th</sup> January, 2014, *Armstrong Auctioneers and Court Bailiffs (2<sup>nd</sup> defendant)* were instructed by the 1<sup>st</sup> defendant bank through their Manager Legal, to advertise and sell the property at the expiry of the notice of sale. On 31<sup>st</sup> January 2014 the notice was made through the Daily Monitor, (*Exh D 11*), a move which prompted the plaintiff to file this suit.

Counsel for the defendant bank submitted correctly so, that all the requisite legal steps had been followed and as such therefore the intended sale was neither illegal nor premature.

This court noted that while the suit was still pending on 17<sup>th</sup> February, 2015 the plaintiff through her counsel had even written to the bank stating that they had sourced for and successfully found an interested purchaser *JACAJU Ltd* which was willing to buy the property.

In that correspondence, the plaintiff alleged that the bank had however frustrated the deal an allegation which the plaintiff by her absence in court failed to substantiate.

The sourcing of a purchaser was further demonstration that the plaintiff had on her own failed to redeem the property. I could not therefore agree more that the plaintiff had more than enough time and opportunity to recover her property which she failed to exercise, without recourse to court.

The only way for the plaintiff was to repay the loan, which she could still have done, notwithstanding the default, between 2014 the time she filed the suit and the time the matter was finally heard in this court.

**Issue No.3 : What remedies available to the parties.**

The bank prayed for an order for the sale of the suit property. As duly submitted by its counsel, *Exh D4* (loan statement), *Exh D 5* (account statement) and *Exh D6* (customer portfolio) all confirm the outstanding sums together with interest as **Ugx 958,215,067/=**. This claim remained unchallenged.



### General damages

**Section 61(1) of the Contracts Act, No. 7 of 2010** is to the effect that a party who suffers a breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him.

In estimating the loss, this court has to consider the means of remedying the inconvenience caused by the non-performance of the contract at the time. (**Section.61 (4) Contracts Act**).

Furthermore, it is clear from the provisions of **section 66 of the Act** that where a contract becomes impossible to perform, parties are to be discharged from further performance.

In the assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered. (**Uganda Commercial Bank Vs Kigozi (2002) EA 305**).

The measurement of the quantum of damages is a matter for the discretion of the court which of course must be exercised judicially. (**Refer to: Southern Engineering Company Vs Mutia [1985] KLR 730**; cited with approval in **Moses Ssali a.k.a. Bebe Cool & Others Vs Attorney General & Others HCCS 86/2010**).

A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been if she or he had not suffered the wrong - (**See Charles Acire Vs Myaana Engola, HCCS 143/1993, Kibimba Rice Ltd Vs Umar Salim, SCCA 17/1992 and Hardley Vs Baxendale (1894) 9 Exch 341**).

This matter has been in court for close to five years. The 1<sup>st</sup> defendant bank had been forced to call it off as a bad debt. The loan had to be repaid within 60 months (five years) *w.e.f* 2013. The plaintiff defaulted in her payments therefore



for a period close to 72 months. Within that time if she had had both the means and intention of thwarting the intended actions for the sale of the mortgaged properties, not limited to her guaranteed right to exercise her right of redeeming the properties she would have done so. In filing this action therefore the plaintiff had been ill advised.

Bearing all the above factors in mind I am satisfied that the defendant bank went through a period of loss and inconvenience as a business entity and is therefore entitled to general damages of **Ug x 70,000,000/=** with interest at a rate of 8% from the date of judgment until payment in full.

In addition, an order issues for the sale by the 1<sup>st</sup> defendant of the suit property to recover the outstanding sum of **Ug 958,215,067/=**, having duly complied with the statutory requirements as spelt under **sections 19 and 26 of the Act.**

I find nothing in the pleadings to justify any action against the 2<sup>nd</sup> defendant. However since he did not file any response to suit the plaintiff shall pay costs only to the 1<sup>st</sup> defendant.

  
**Alexandra Nkonge Rugadya**

**Judge**

**8<sup>th</sup> February, 2019**

**Date of delivering the ruling.....**

**Delivered in the presence of:**

**Court clerk.....**

***For applicant.....***

***For respondent.....***