
UGANDA / JUDGMENT

Baitwa & 2 Others v Standard Chartered Bank (U) Limited (Miscellaneous Cause 70 of 2024) [2024] UGCommC 210 (23 July 2024)

[2024] UGCommC 210

COURT
Commercial Court of Uganda

BEFORE
Mutesi, J

CASE / FILE NUMBER
Miscellaneous Cause 70 of 2024

Source: ulii.org · Research copy typeset by Esheria. Not court-issued or certified.

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA (COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE NO. 0070 OF 2024

1. CYNTHIA M. BAITWA

2. LEILA NAMAZZI BAITWA

3. THREEWAYS SHIPPING SERVICES (GROUP) LTD ::::::::::: APPLICANTS
(Nominal Applicant) $\mathcal{R} = \mathcal{R} \otimes \mathcal{R} = \mathcal{R}$
 $\otimes \mathcal{R}$

VERSUS

STANDARD CHARTERED BANK (U) LTD :::::::::::

(Before: Hon. Justice Patricia Mutesi)

RULING

Background

The Applicants brought this application by notice of motion under Section 98 of the Civil Procedure Act Cap 71, Regulation 13(7) of the Mortgage Regulations. 2012 and Order 52 of the Civil Procedure Rules, S. I. 71-1 seeking orders that:

- 1. The illegal and irregular advertisement published in the *Daily Monitor* News Paper dated 20th June 2024 be set aside.
- 2. The Applicants are exonerated from having to pay 30% of USD 1,734,094 being USD 520,228.2.
- 3. An interim order doth issue preventing the Respondent or its agents, employees, or workers or any of their representatives from forcefully evicting the Applicants from their property comprised in Kyadondo Block 216 Plot 629, Nsimbiziwome and Kyadondo Block 250 Plot 193 at Bunga. Kampala until the determination of Misc. Appeal No. 15 of 2024 and Misc. Application No. 1326 of 2024.
- 4. The condition in the ruling and orders of Court in Misc. Application No. 87 of 2024 requiring the Applicants to make a deposit of 30% of USD 1,734,094 being USD 520,228.2 be set aside and the injunction as granted be made unconditional.

- 5. The sale or disposal be stopped/adjourned until the Court determines the sums payable by the Applicants in Civil Suit No. 0071 of 2024.
- 6. Costs of this application be provided for.

Briefly, the grounds of this application are that:

- 1. The 3rd Applicant obtained a facility ("the suit loan") from the Respondent and the same was secured by mortgages over 6 parcels of land.
- 2. Those properties are still in the Respondent's custody, save for the land comprised in LRV 4525 Folio 17 on Kyadondo Block 236 Plot 3070 situate at Namanve which was sold in 2020 but which is the subject of litigation in HCCS No. 0050 of 2021, Threeways Shipping Services (Group) Ltd v Standard Chartered Bank (U) Ltd & Anor.
- 3. The directors of the 3rd Applicant were asked to guarantee the suit loan which they did. They were also compelled to mortgage their respective personal properties as secondary securities for the repayment of the loan.
- 4. As a consequence, the 1st Applicant, as a spouse of one of the directors and a joint proprietor of Kyadondo Block 250 Plot 193 situate at Bunga which houses their matrimonial home, was asked to execute a mortgage deed and a personal guarantee, and to consent to the mortgage. The 2nd Applicant was also asked to offer spousal consent for the mortgage on Kyadondo Block 216 Plot 629 situate at Nsimbiziwome.
- 5. The suit loan was settled by way of a consent judgment and the 1st and 2nd Applicants were not involved in the proceedings leading up to that consent judgment.
- 6. On 8th January 2024 and 20th June 2024, the Respondent advertised the land comprised in Kyadondo Block 250 Plot 193 situate at Bunga and Kyadondo Block 216 Plot 629 situate at Nsimbiziwome ("the advertised property") for sale.
- 7. The 1st Applicant together with her husband and the husband of the 2nd Applicant filed the main suit challenging the legitimacy of the intended sale. They also filed Misc. Application No. 0087 of 2024 for a temporary injunction restraining the Respondent from selling the said properties. Misc. Application No. 0087 of 2024 was allowed subject to prior deposit of 30% of the outstanding sum within 45 days from the date of the ruling.
- 8. The Applicants are housewives with no plausible source of income.

$\mathcal{L}_{\text{max}} = 10$

$\mathcal{R}_{\mathcal{C}}$

- 9. The Applicants have appealed the said ruling in Misc. Appeal No. 15 of 2024 which is still pending before the Court.

- 10. It is in the interest of justice that this application is allowed.

The application is supported by the affidavit of the 1st Applicant. She told the Court that she is the wife of Geoffrey B. Baitwa, a director in the 3rd Applicant, and one of the registered proprietors of Kyadondo Block 250 Plot 193 Land at Bunga, Kampala. Therein she stated that the 3rd Applicant obtained a facility from the Respondent and the same was secured by, among others, LRV 4525 Folio 17 on Kyadondo Block 236 Plot 3070 at Namanve and LRV 4550 Folio 11 Plot 1, LRV 4550 Folio 12 Plot 2, LRV 4550 Folio 16 Plot 3, LRV 4550 Folio 14 Plot 4 and LRV 4550 Folio 15 Plot 5 all situate at Mpanda Link, Industrial Area, Bugolobi. Those properties are mortgaged to the Respondent and are still in its custody save for LRV 4525 Folio 17 on Kyadondo Block 236 Plot 3070 at Namanve which was sold but it is still a subject of litigation in HCCS No. 0050 of 2021, Threeways Shipping Services (Group) Ltd v Standard Chartered Bank (U) Ltd & Anor.

The 1st Applicant stated that the directors of the 3rd Applicant were, as a matter of prudence, required to guarantee through personal guarantees the repayment of the loan taken by the 3rd Applicant. As such, they were compelled to mortgage their respective personal properties as secondary securities to the facility taken by the 3rd Applicant in support of those personal guarantees. The 1st Applicant, as a spouse and joint proprietor of Kyadondo Block 250 Plot 193 Land at Bunga, was required to execute a mortgage deed, a personal guarantee and spousal consent for the same property to be used as a secondary security for the facility being taken by the 3rd Applicant. The 2nd Applicant is neither a proprietor of the properties of the 3rd Applicant nor of the land comprised in Kyadondo Block 216 Plot 629 Nsimbiwome, but, as a practice, she was required to offer spousal consent for the facility to be processed.

She clarified that Kyadondo Block 250 Plot 193 Land at Bunga and Kyadondo Block 216 Plot 629 Nsimbiwome are the matrimonial homes/family property of the Applicants, and that they have lived in these homes for over 15 years with their children.

The 1st Applicant further stated that the mortgage for which the Applicants were involved was settled by consent, whereby the Respondent agreed to a sum of

$$\log \frac{1}{\epsilon} = \frac{2\epsilon}{\epsilon_0} = \frac{2\epsilon}{\epsilon_0} \quad (6)$$

USD 3,700,000 as the outstanding debt. Payments were made to that consent. The Respondent later agreed to vary the terms of that consent judgment and, under the new terms, the 3rd Applicant was required to pay USD 362,757 within 30 days from the date of the signing the variation of the consent judgment and USD 1,850,000 by 31st August 2020. The Applicants were never involved in those proceedings, consent and variations by the 3rd Applicant and the Respondent. In effect, the Applicants were discharged as sureties.

Finally, the 1st Applicant told the Court that the Applicants were only awakened to the fact that their respective homes were up for sale by 2 advertisements in the newspaper by the Respondent bank on 8th January 2024 and 20th June 2024. The

1st Applicant, her husband and the husband of the 2nd Applicant filed the Civil Suit No. 0071 of 2024 challenging the legitimacy of the intended sale. They also filed Misc. Application No. 0087 of 2024 asking for a temporary injunction restraining the Respondent from conducting the sale. That application was allowed subject to deposit of 30% of the outstanding sum within 45 days from the date of the ruling. The Applicants are housewives with no plausible source of income and they have appealed the said ruling in Misc. Appeal No. 15 of 2024 which is still pending before the Court.

The Respondent opposed the application through an affidavit in reply sworn by its Senior Manager, Stressed Assets Group, Mr. Richard Ssuna. He stated that the 1st and 2nd Applicants are neither guarantors nor sureties to the 3rd Applicant's loan. He also clarified that the 2nd Applicant is not a registered proprietor of any of the mortgaged properties.

Mr. Ssuna explained that in June 2015, the 3rd Applicant obtained two credit facilities from the Respondent in the sum of USD 4,100,000 and USD 2,833,000, respectively. The facilities were secured by, among others, a mortgage over land comprised in LRV 4525 Folio 17 Plot 3070 Kyadondo Block 236 situate at Namanve, a further charge over land comprised in Kyadondo Block 216 Plot 629 situate at Nsimbiziwome owned by Oscar Rolands Baitwobusa and a further charge over the land comprised in Kyadondo Block 250 Plot 193 situate at Bunga Hill registered in the names of the 1st Applicant and Geoffrey Baitwa.

He stated that on 3rd March 2016, owing to the 3rd Applicant's default in its loan repayment obligations and a restructure request, the Respondent restructured the facilities to USD 5,541,690. On 20th July 2016, owing further default, the

Respondent issued a notice of default to the Applicants recalling the facility then standing at an indebtedness of USD 4,832,940.16 as at 18th July 2016. On 3rd October 2016, the Respondent then issued a notice of sale to the 3rd Applicant as the principal debtor as well as the Applicants.

Mr. Ssuna revealed that in December 2016, in response to the Respondent's process of foreclosure, the 3rd Applicant, together with Bro Group Ltd, instituted Civil Suit No. 977 of 2016 against the Respondent. On 8th November 2018, that suit was mutually settled and the Respondent discounted the 3rd Applicant's debt allowing it to pay USD 3,700,000 in full settlement of the debt and that suit, provided the debt was settled in accordance with the set time frame. The 3rd Applicant failed to comply with the stipulated timelines and only paid a total of USD 1,487,243 in April 2019. The 3rd Applicant requested the Respondent to extend the timelines for payment and the Respondent obliged.

He also stated that when he 3rd Applicant still failed to pay, the Respondent advertised and sold the Namanye Property, but the monies realised from the sale did not extinguish the debt. To-date, the 3rd Applicant has never fully paid the loan debt and its indebtedness stands at USD 1,734,094. On 1st April 2021, the Respondent issued a

demand for payment of the said USD 1,734,094 and recovery costs to the 3rd Applicant. On 8th January 2024, the Respondent, owing to the failure of the 3rd Applicant to clear its indebtedness, proceeded to advertise the remaining mortgaged properties for sale.

Finally, Mr. Ssuna stated that on 15th January 2024, the 1st Applicant's lawyers wrote to the Respondent's lawyers claiming that the Applicant's were not indebted to the Respondent in the sum of USD 1,734,094 as demanded. On 4th April 2024, this Court issued a temporary injunction stopping the sale as per the advert of 8th January 2024 on condition that the 1st and 3rd Applicants deposit 30% of the outstanding sum (USD 520,228.2) within 45 days. That period lapsed on 19th May 2024 without any payment being made prompting the Respondent to re-advertise the properties for sale on 20th June 2024.

Issues arising

1. Whether the advertisement of sale of the land comprised in Kyadondo Block 216 Plot 629 situate at Nsimbiziwome and Kyadondo Block 250 Plot 193 situate at Bunga by the Respondent should be set aside.
- 2. Whether the Applicants should be exonerated from having to pay any sum of money as a condition for securing a temporary injunction halting the sale of the land comprised in Kyadondo Block 216 Plot 629 situate at Nsimbiziwome and Kyadondo Block 250 Plot 193 situate at Bunga until the disposal of Civil Suit No. 0071 of 2024.
- 3. What reliefs are available to the parties.

Representation and hearing

At the hearing, the Applicants were represented by Mr. Masiga Colline of M/S Barenzi & Co. Advocates while the Respondent was represented by Mr. Raymond Mwebesa, Ms. Barbara Musiimenta and Mr. Thomas Kato of M/S Kampala Associated Advocates. Counsel argued the application orally. I have fully considered all the submissions made, the laws and authorities cited therein in reaching this decision.

Determination of the issues

Issue 1: Whether the advertisement of sale of the land comprised in Kyadondo Block 216 Plot 629 situate at Nsimbiziwome and Kyadondo Block 250 Plot 193 situate at Bunga by the Respondent should be set aside.

Section 19 of the Mortgage Act, in relevant part provides that:

"19. Notice on default

- (1) Where money secured by a mortgage under this Act is made payable on demand, a demand in writing shall create a default in payment.
- (2) Where the mortgagor is in default of any obligation to pay the principal sum on demand or interest or any other periodic payment or any part of it due under any mortgage or in the fulfilment of any covenant or condition, express or implied in any mortgage, the mortgagee may serve on the mortgagor a notice in writing of the *default and require the mortgagor to rectify the default within fortyfive working days.*" Emphasis mine.

Section 19(3) of the Mortgage Act adds that a notice of default must be in the prescribed form and that it must adequately inform the mortgagor of the nature and extent of the default made by the mortgagor, and if the default consists of non-payment of monies, the amount that must be paid to rectify the default.

It is now trite law that a mortgagee who is unable to prove to the Court that he or she served a notice of default on a mortgagor cannot proceed to exercise any of his or her statutory rights of recovery under the Mortgage Act. Additionally, a mortgagee who fails to serve a notice to sell upon a mortgagor at least 21 days before the sale is in breach of Section 26(2) of the Mortgage Act. (See Ecumenical Church Loan Fund Uganda Ltd v Ways KM Uganda Ltd, HCCS No. 11 of \$2014.\$)

It is also a settled position of the law that once a mortgage, always a mortgage. This means that a mortgage operates primarily as security for the repayment of a loan. A mortgage is not essentially intended to constitute a transfer of title to the mortgaged property and a mortgagee who is not in default or who is able to rectify the default in the mortgage should be free to redeem his or her property. That equity of redemption, which is the bedrock of our mortgage law, ensures that, fully satisfying the debt secured by the mortgage, the mortgagor should be able to redeem the mortgaged property. For those reasons, it is unlawful for a mortgagee to clog the equity of redemption by denying the mortgagor a chance to repay the loan and redeem the mortgaged property.

From Section 19(1) of the Mortgage Act that is reproduced above, default is only established when the notice of default is served. Default on a mortgage cannot be said to exist before it is duly established through the issuance and service of a notice of default on the mortgagor. In the present case, I cannot see what default the Respondent intends to remedy by selling the advertised property. The Respondent did not establish default by the Applicants because it did not serve them with a notice of default before advertising the advertised properties in January and June 2024.

The law anticipates a possibility in which a mortgagor rectifies a default after being served with a notice of default. In the present case, it follows that, if the Respondent had served a notice of default on the Applicants, they would have known how much money is demanded under the suit loan by the Respondent. There is also a likelihood that they could have paid or organised to pay it off. thereby averting this application and the main suit altogether.

7

It is not enough for the Respondent to reveal to the Applicants how much it is now demanding from them through its affidavit in reply in this application or even through its defence in the main suit. A notice of default is an inalienable step in the foreclosure process. Telling the Applicants how much is demanded from them only through court documents undermines the letter and spirit of the Mortgage Act by perpetrating recovery by ambush. It is absurd that the Respondent did not give the Applicants the opportunity to know about the default before deciding to sell the advertised property. Until the facts of this case, the days of recovery by ambush had, for long, been forgotten.

In its reply to this application, the Respondent made two claims. First, it adduced notices of default and sale issued on 3rd October 2016 which were purportedly served on the Applicants at the time. While those notices are noted, I do not accept that a notice of default and a notice of sale issued over 7 years before a sale can be sufficient to satisfy the requirements of Sections 19 and 26 of the Mortgage Act. Apart from the passage of time that should ordinarily necessitate fresh notice to be issued to the mortgagor before enforcing the mortgage, the facts of this case are that there was litigation in Civil Suit No. 0977 of 2016 which substantially altered the outstanding sum by the parties consenting to reduce the loan debt to USD 3,700,000. There was further repayment of the loan between 2018 and 2019, and the Respondent also received proceeds from the subsequent sale of the secured Namanye land all of which reduced the sum due. In light of such a substantial change in the outstanding debt, the Respondent ought to have issued fresh notice to reflect the true debt claim at the time of the intended sale. $\mathcal{L} = \mathcal{L} \mathcal{L} \mathcal{L}$

The Respondent's other explanation for its omission to issue fresh notices of default and sale is that, in the consent judgment in Civil Suit No. 0977 of 2016, the parties agreed that, in case the 3rd Applicant defaulted, the Respondent could enforce its rights against the securities in the mortgage without the need for any notices, as would ordinarily be required. The Respondent annexed the said Consent to its affidavit in reply. In relevant part, it states that:

"6. Upon any default in payment, all monies payable under this Consent Judgment shall become due and payable immediately and the Defendant shall be at liberty to continue with the enforcement of its *securities, including the sale and realisation of the mortgaged properties* listed below, to recover the entire outstanding sums due together with costs of the recovery without further recourse to Court.

(i) Property comprised in Kyadondo Block 250 Plot 193 Bunga, Kampala and Kyadondo Block 216 Plot 629 Nsimbiziwome, *Kampala; ...*" Emphasis mine.

Contrary to the Respondent's arguments, it is clear that the consent judgment only permitted the Respondent to revive its efforts to recover the loan arrears through enforcement of security without recourse to Court. It was silent on if those recovery efforts would involve issuance of the prescribed notices under the Mortgage Act. I am convinced that, if the parties had intended that default in satisfying the terms of the consent judgment could be met with enforcement of

$$\cos\left(\frac{\omega}{2}\right) = \cos\left(\frac{\omega}{2}\right) = \sin\left(\frac{\omega}{2}\right)$$

10 / 10