

UGANDA / JUDGMENT

DFCU v Uganda Signs Limited & 2 Others (Originating Summons 17 of 2018) [2022] UGCommC 176 (20 December 2022)

[2022] UGCommC 176

COURT

Commercial Court of Uganda

BEFORE

Anna B. Mugenyi, J

CASE / FILE NUMBER

Originating Summons 17 of 2018

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

ORIGINATING SUMMONS NO. 0017 OF 2018

IN THE MATTER OF LAND COMPRISED IN KYADONDO BLOCK 220

PLOT 849 SITUATE AT KIWATULE

AND

**IN THE MATTER OF AN APPLICATION FOR THE ENFORCEMENT OF RIGHTS IN THE
EQUITABLE MORTGAGE**

DFCU.....

VERSUS

- 1. UGANDA SIGNS LTD
- 2. CECILIA MULEKEZI ADRIKO
- 3. ADRIKO AGOTRE PHILIAM.....

BEFORE: HON. LADY JUSTICE ANNA B. MUGENYI

JUDGMENT

PLAINTIFF'S CASE

The plaintiff granted to the 1st defendant a credit facility of Ugx 60,000,000/= and the repayment of the said sum was secured by a mortgage over the suit property which belonged to the 2nd defendant, who together with the 3rd defendant are directors in the 1st defendant. The 1st defendant defaulted on its repayment obligations hence this suit.

The plaintiff brought this originating summons under Order 37 rule 4 & 8 of the Civil Procedure Rules seeking to foreclose the respondent's equity of redemption in respect of the suit property comprised in Kyadondo Block 220 Plot 849 Land at Kiwatule. The originating summons is supported by an affidavit dated 11/4/2016 sworn by Pious Olaki, the Senior Legal Manager of DFCU Bank Ltd.

The defendants filed an affidavit in reply that raised a preliminary point of law that the suit was res judicata; and when the preliminary objection was overruled in 2018 and the defendants applied and were allowed to file another affidavit in reply by

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20/1/2019 but did not bother to do so the matter proceeded uncontested on its merits as directed by the Court.

Counsel for the plaintiff agreed to file written submissions in this matter and the same have been considered in this Judgment.

REPRESENTATION

The plaintiff was represented by M/s Ligomarc Advocates while the respondents were unrepresented having failed to file an affidavit in reply.

JUDGMENT

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The Issues for determination before this Court are:

- 1. Whether there is an equitable mortgage between the plaintiff and the defendants
- 2. What is the appropriate procedure?
- 3. What are the remedies available to the plaintiff?

Issue 1: Whether there is an equitable mortgage between the plaintiff and the defendants

According to the affidavit in support of the originating summons filed by the plaintiff and sworn by Pious Olaki, by a facility letter dated 31/5/2007 (annexure 'A' to the said affidavit) the plaintiff agreed to grant the 1st defendant a lease facility of Ugx 60,000,000/= to purchase a large format digital printer. The 1st defendant undertook to repay the said facility by paying Ugx 3,178,662/= per month for a period of 24 months.

To secure the repayment of the loan, the 1st defendant deposited with the plaintiff the certificate of title in respect of the land comprised in Kyadondo Block 220 Plot 849 Land at Kiwatule and after depositing the said certificate of title, the mortgage deeds and other accompanying documents were signed by the 2nd and 3rd defendants in their capacities as directors of the company. The plaintiff then proceeded to have the mortgage registered on the certificate of title for the mortgaged land.

Further that the 1st defendant defaulted on its facility repayment obligations and failed to honour all its undertakings to regularise its accounts as can be shown by the 1st defendant's ledger postings and correspondences which were attached to the affidavit and marked 'E' and 'F1' to 'F4'. On 12/11/2008, the plaintiff issued a final demand for the payment of Ugx 63,706,433/= that was due on the account and subsequently on 27/1/2009 the plaintiff bank enforced its rights in the mortgage by

appointing a one Mr. Herman Buyambi as receiver/ manager in respect of the mortgaged property.

In 2011, the plaintiff sought to enforce its mortgage and filed Originating Summons No. 9 of 2011. The defendants challenged the execution of the mortgage and the Court ruled that the said legal mortgage was not properly executed and it was declared null and void. During the whole time, the 1st defendant never made any payments towards discharging the loan and neither did the 2nd and 3rd defendants who were the directors and shareholders of the company and thereby ultimately benefitted from the proceeds of the loan. Following the Court's direction that the legal mortgage was unenforceable, the plaintiff being in custody of the certificate of title proceeded to register a caveat on the suit property to perfect its equitable mortgage and a copy of the said title encumbered with the plaintiff's caveat was attached to the affidavit in support and marked 'C'.

Pious Olaki further averred that to date (that was 11/4/2016) the outstanding debt due on the 1st defendant's loan account is still due and owing after five years from when they were served with the final demand notice and enforcement process began and that the total sum due inclusive of costs is Ugx \$62,316,276/\$ =; and that the plaintiff has suffered a huge financial loss as its monies have remained tied down without any value addition and yet the defendants have by their conduct indicated that they never intended to repay. Further that the 2nd/

sup> defendant lodged a caveat on the mortgaged property and this has encumbered the plaintiff's chances to successfully obtain purchasers for the same and the said caveat ought to be removed to enable the plaintiff enforce its equitable mortgage.

I agree with the submissions of counsel for the plaintiff in respect of the creation of equitable mortgages under the Mortgagee Act 2009 and section 129 of the Registration of Titles Act (Cap 230) (RTA). In the present matter, the 1st defendant by a resolution dated 25/5/2007 was authorised to obtain a lease facility from the plaintiff of up to Ugx 60,000,000/= and was authorised to pledge the suit property as security for the said facility among other things. It is evident that the parties intended to create a legal mortgage but this was declared null and void by the Court in November 2014 because it was not properly executed. The plaintiff then secured its interest as an equitable mortgagee by lodging a caveat on the title in issue on 8/9/2015 to perfect its equitable mortgage in accordance with the provision of section 129 \$(3)\$ of the RTA.

I find that the plaintiff has met the conditions required to create an equitable mortgage by deposit of a certificate of title by the registered proprietor with intent

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to create a security thereof and the lodging of a caveat thereon to give notice of its interest to the public.

Issue 1 is accordingly resolved in the affirmative.

Issue 2: What is the appropriate procedure?

Issue 3: What are the remedies available to the plaintiff?

The above Issues will be handled together since they address more or less the same matter.

Whilst it is true that the procedure for foreclosure of the mortgagor's equity of redemption is provided for under Order 37 rule 14 of the Civil Procedure Rules as submitted by counsel for the plaintiff; in order to determine whether the plaintiff can foreclose and sell the suit property to recover its money together with interest and other charges incidental thereto section 8 of the Mortgage Act (Cap. 229) is instructive on the procedure to be followed in applications of foreclosure such as the present one.

Section 8 (2) of the Mortgage Act (Cap. 229) provides:

8. Foreclosure.

\$(1)\$...

- (2) "Upon an application by the mortgagee under this section, the court shall determine the amount due to the mortgagee and may fix a date, not exceeding six months from the date of the failure to pay, within which the mortgagor shall pay the amount due".

Section 8 \$(3)\$ of the same Act then provides:

"If the mortgagor fails to pay on the date fixed by the court under subsection (2), the court shall order that the mortgagor be foreclosed of his or her right to redeem the mortgaged land and that the land be offered by the mortgagee for sale in accordance with section 9."

In light of the above provisions of law and from the originating summons and the affidavit in support thereof plus annexures 'G' and 'H' (i.e. the final demand and instruments of appointment of receiver/ manager), the plaintiff has satisfactorily demonstrated that the mortgagor is indebted to the plaintiff in the sum of Ugx

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63,706,433/= as at \$12/11/2008\$ and the said sum is declared as due and owing to the plaintiff.

Further, this Court orders the 1st defendant who is the mortgagor to pay the said amount to the plaintiff within two (2) months from the date of delivery of this Ruling and in the event of default, the plaintiff shall return to this Court for the grant of an order for foreclosure.

In the same breath as the Court's decision in the case of DFCU Bank Ltd v Dotways Marketing Bureau Ltd & Anor (Originating Summons 6 of 2012), this Court directs the plaintiff to notify the 1st defendant of this order by placing the same in a newspaper with wide national circulation since the 1st defendant did not file its affidavit in reply by 20/1/2019 as directed by Court resulting in the exparte proceedings herein.

Given the fore going result, the rest of the remedies sought by the plaintiff will be handled by this Court in the event of default by the 1st defendant.

The costs of this suit shall be paid by the 1st defendant.

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HON. LADY JUSTICE ANNA B. MUGENYI DATED.....

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