

UGANDA / JUDGMENT

Kasese Hospital Limited & Another v The
Miscro Finance Support Centre Limited
& Another (Civil Suit 684 of 2019) [2024]
UGCommC 259 (19 August 2024)

[2024] UGCommC 259

COURT

Commercial Court of Uganda

BEFORE

Anna B. Mugenyi, J

CASE / FILE NUMBER

Civil Suit 684 of 2019

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA [COMMERCIAL DIVISION]

CIVIL SUIT NO. 684 OF 2019

1. KASESE HOSPITAL LIMITED

2. BAGUMA JOHN HENRY::::::::::::::::::::::::::::::::

VERSUS

1. THE MICRO FINANCE SUPPORT CENTRE LIMITED <table> 2. BWAMBALE
KALAMBAYI::::::::::::::::::::::::::::::::

BEFORE: HON. LADY JUSTICE ANNA B. MUGENYI JUDGMENT

The Plaintiffs filed this suit by way of ordinary Plaintiff against the Defendants jointly and severally for a declaration that the Murabaha Facility Agreement between the 1st Plaintiff and the 1st Defendant was governed by the Sharia Law, that the 1st Defendant violated the terms of the agreement when it sold off the security property to the 2nd Defendant, a declaration that the sale between the 1st and 2nd Defendant is null and void, that the sale be set aside and the property reverts back to the 2nd Plaintiff or in the alternative the 1st Defendant pays UGX

1,100,000,000/ being the market value of the property, general damages, interest and costs of the suit.

The brief facts constituting the Plaintiffs' case are that the 1st Plaintiff obtained Murabaha facility of UGX 303,000,000/ from the 1st Defendant through the Islamic Banking Model, and that the 2nd Plaintiff guaranteed the facility to the 1st Plaintiff

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Defendant with his certificate of title of land comprised in FRV HQT735 Folio 19 Block 26 Plot 182 land at Kabuyiri, Bukonzo County, Kasese District. That according to Clause 15.03 of the Murabaha facility agreement signed on 3rd May 2017, the banking model was governed by Sharia law, where the parties intended to share the profits and losses of the facilities, and the monies would not attract interest.

That due to challenges, the 1st Plaintiff failed to meet the monthly repayments and informed the 1st Defendant of the intention of Uganda Development Bank to buy off the facility, and requested for rescheduling of the facility. That the 1st Plaintiff made payment of UGX 57,000,000/ after the reschedule but was surprised when the 2nd Plaintiff was served with a notice of vacant possession as the property had been sold to the 2nd Defendant. The Plaintiff avers that the sale is in total violation of the facility which is governed by Sharia laws, and that it was also illegally sold on an illegal valuation report hence this suit.

The 1st Defendant in their Written Statement of Defence admit granting the Murabaha facility to the 1st Plaintiff and add that the facility was secured by a legal mortgage on the said property registered in the names of the 2nd Plaintiff. That the 1st Plaintiff defaulted in repayment of the contract price plus 10% being mark-up contrary to the facility agreement. That following the 1st Plaintiff's constant default, the 1st Defendant embarked on the legal process of realising the mortgaged property under the Mortgage Act by issuing notices of default and subsequently notice of sale to the Plaintiffs.

That despite the said notices, the Plaintiffs ignored the payment prompting the 1st Defendant to instruct its agents to advertise the mortgaged property for sale and carrying out fresh valuation. That upon receiving bids, the property was sold to the

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2nd Defendant, being the highest bidder at UGX 480,210,000/. The 1st Defendant avers that it is not true that the parties were entitled to share the profits and losses under the Sharia law as the Plaintiffs were at all times aware of the terms of the Murabaha facility. That there was no consent required from the Plaintiffs in order for the 1st Defendant to realise the mortgaged property. That the property was legally advertised and sold, therefore the 1st Defendant prayed that the suit be dismissed with costs.

The 2nd Defendant in his Written Statement of Defence avers that he is a lawful purchaser for value of the premises, and that he was not aware of any illegalities complained of by the Plaintiff against the 1st Defendant. That he is the rightful purchaser of the property having purchased the same for value from the 1st Defendant after seeing an advert in the Daily Monitor of 9th April 2019, and that he put in his bid, like any other bidder, and he emerged the best valuated bidder. He added that should Court find any reason to cancel the transaction, the 1st Defendant is liable to indemnify the 2nd Defendant for all the losses incurred from the transaction.

The 2nd Defendant also filed a Counterclaim against the 1st and 2nd Plaintiffs and the 1st Defendant jointly and severally for a declaration that the Counter claimant is the lawful purchaser of the suit property, an order for vacant possession, general damages, interest and costs of the Counterclaim. He avers that the 1st Counter Respondent (1st Defendant) sold to him the property which he bought in good faith, and that should Court cancel the transaction, the 1st Counter Respondent is liable to indemnify him for all the losses and liability as a result of the transaction.

That the Counter claimant has suffered mental anguish, financial loss and is entitled to general damages, as he has been blocked in a controversial transaction yet he is a businessman.

In reply to the Counterclaim, the 2nd and 3rd Counter Respondents (1st and 2nd Plaintiffs) aver that the Counter claimant did not buy the property in good faith as they ignored the fact that the 1st Counter Respondent did not have authority to sell the suit property and also neglected to inquire or to find out whether the 1st Counter Respondent had authority. That the Counterclaimant is not a purchaser for value since he knew that the 1st Respondent had no authority to sell the property without the consent of the 2nd Respondent.

REPRESENTATION

The Plaintiffs were represented by M/S Masereka, Mangeni & Company Advocates whereas 1st Defendant was represented by MACB Advocates and the 2nd Defendant (Counterclaimant) was represented by M/S Ngameji Law Consultants Advocates.

JUDGMENT

I have carefully listened to the evidence and read the submissions of the parties in this matter. During the scheduling conference, the following issues were agreed upon for resolution by this Court:

- 1. Whether the 1st Defendant was in breach of the Murabaha Facility when it sanctioned the sale of the suit property to the 2nd Defendant without the consent of the 1st Plaintiff?
- 2. Whether the 1st Plaintiff was in default of its contractual obligations at the time of sale of the suit property?
- 3. Whether the sale of the security property below the forced sale value was illegal?
- 4. Whether the 1st Defendant was entitled to any mark-up from the 1st Plaintiff before any profits could be declared by the 1st Plaintiff?
- 5. Whether there is a valid sale of property comprised of FRV HOT 753 Folio 19 Block 26 Plot 182 land at Kabunyiri by the 1st Defendant to the 2nd Defendant?
- 6. What reliefs are available to the parties?

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Counsel for the Plaintiff handled issues 1, 2 and 4 concurrently, therefore since they are related, I will also follow suit, however, before I even determine any breach on the part of the 1st Defendant, I prefer to handle issue No. 2 first on the Plaintiff's breach. It was submitted for the Plaintiffs that 1st Plaintiff and 1st Defendant entered into a mudarabah agreement governed by Sharia law, and that Regulation 11 (3) (c) of the Financial Institutions (Islamic Banking) Regulations No.2 of 2018 states that equity financing including mudarabah is a profit sharing partnership by which capital is provided by financial institutions to its customers.

Counsel further submitted that according to P. Exh 3, 10% of the profits from the 1st Plaintiff could only be determined after the 1st Plaintiff had declared profits from the use of the assets acquired with the financial facility provided by the 1st Defendant. He added that according to the evidence of PW1, there were no profits made to entitle the 1st Defendant to the 10% mark-up as agreed by the parties. In

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conclusion, that under Sharia law, the parties agreed to do business and share profits so in the absence of profits, the 1st Defendant was wrong to cap mark-up before the 1st Plaintiff declared any profits. Therefore, Counsel submits that the 1st Plaintiff was not in default of its obligations at the time of sale.

In reply, Counsel for the 1st Defendant submitted first that the Plaintiff Counsel has confused Court by misrepresenting the facility as a mudarabah facility as opposed to a Murabaha agreement. He added that the title of P. Exh 3 is clear that it is a Murabaha agreement. He further submitted on their distinctions stating that the Murabaha is a mark-up financing which is a non-profit and loss sharing scheme whereas the Mudarabah is a trustee finance contract which involves profit and loss sharing. He submitted that DW2 in her evidence stated that the parties entered into a Murabaha agreement, and that under clause 9 of the agreement, default was upon failure to pay the sum instalment or any profit when it fell due, and that the 1st Plaintiff defaulted in making its monthly payments, failed to remedy it despite issuance of the notice of default, forcing the 1st Defendant to exercise her remedies under the Mortgage Act. Counsel added that the PW1 admitted to the default in paragraph 16 of his witness statement.

Counsel also cited several verses in the Quran to submit that Allah permits trade and forbids usury. He added that the Sharia law enjoins one to honour their contracts and agreements. Therefore, that the 1st Plaintiff entered into a trade called Murabaha and agreed on several covenants which included repaying the contract price in several instalments, however, the 1st Plaintiff did not fulfil the said covenants which amounted to default.

It is not disputed that the 1st Plaintiff and 1st Defendant entered into a financing facility as evidenced by the Offer letter dated 31st March 2017 and later the

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Murabaha agreement dated 3rd May 2017. Whereas there is a dispute as to the nature of transaction, Regulation 11 (1) of the Financial Institutions (Islamic Banking) Regulations No.2 of 2018 provides that:

'financing arrangements under Islamic financial business may include the making available of any credit provision in accordance with the Act and these Regulations.'

Regulation 11 (2) thereof goes on to provide for the different forms of credit provision to include the following:

"(a) equity partnership financing;

- (b) lease based financing; or

- (c) sale based financing."

The subsequent regulations explain the three different forms, I will not reproduce them here, however, in this instant case, it is clear from both Clause 2 of the Offer letter (P. Exh 1) dated 31st March 2017 and Clause 1 of the Murabaha Agreement (P. Exh 3) dated 3rd May 2017 that the purpose of the facility was for the purchase of a fully automated clinical chemistry machine and maternity bed unit for the 1st Plaintiff by the 1st Defendant. In fact, the latter goes ahead to specify that it is by way of

Murabaha facility. Clause 1.01 provides:

"This Agreement sets out the terms and conditions upon and subject to which MSC has agreed to purchase a fully automated clinical chemistry machine and a maternity bed from Bio Logicals Uganda Ltd and sell the same to the 1st Plaintiff by way of Murabaha facility."

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A sale based financing is defined under *Regulation 11 (5)* of the *Regulations* to mean:

"Sale based financing referred to in subregulation \$(2)(c)\$, is an arrangement where assets are purchased by a financial institution and sold to a customer at a price greater than the cost price at which the asset was purchased by the financial institution."

Looking at Clause 1.01 of the Murabaha Agreement, it is clear that the 1st Defendant being the financial institution purchased the fully automated clinical chemistry machine and maternity bed from Bio Logicals Uganda Limited and sold it to the 1st Plaintiff at a price higher than the cost price by including the 10% mark-up. Therefore, it is not true that the parties entered a profit sharing partnership (mudarabah) which is the equity financing under Regulation 11 \$(3)(c)\$ of the Regulations. Being that as it may, I disagree with Counsel for the Plaintiffs that the 1st Plaintiff did not default since no profits had been declared, as this was not the equity partnership financing.

Under Clause 4 of the Offer, the facility was available for three years from the date of disbursement and that payment of the investment capital would commence in the 3rd month while the mark up payment in the 1st month for 3 months. Clause 4 (b) provided for the customer to reimburse MSC the cost of purchasing the machine plus a mark-up of 10% per annum in instalments by issuing 36 cheques.

Default or breach of contractual obligations has been defined by the Courts severally; one such case is **Ronald Kasibante V Shell Uganda Limited HCCS No. 542 of 2006** where it was held:

"Breach of contract is the breaking of the obligation which a contract imposes" which confers a right of action for damages on the injured party. It entitles him to

treat the contract as discharged if the other party renounces the contract or makes the performance impossible or substantially fails to perform his promise; the victim is left suing for damages, treating the contract as discharged or seeking a discretionary remedy."

In relation to Islam, Counsel for the 1st Defendant cited the *Quran 5*:1 and *Quran* 17: 34 which enjoins believers to fulfil all their covenants and to uphold their obligations. In this instant case, it is not in dispute that the 1st Plaintiff defaulted in repaying the facility as seen in paragraphs 16 and 17 of PW1's witness statement where he admitted to the challenges in paying the facility and attributed it to failure to make profits. Therefore, since I have already considered above that this was not a Mudarabah agreement (profit partnership) but rather a Murabaha agreement, the issue of non-declaration of profits does not shield the 1st Plaintiff. I therefore find that the 1st Plaintiff was in breach of its contractual obligations at the

time of the sale.

Therefore, issue 2 is answered in the affirmative. Since issue 4 is directly connected to the previous issue, I will handle it next.

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As to whether the 1st Defendant was entitled to any mark-up from the 1st Plaintiff before any profits could be declared by the 1st Plaintiff, Counsel for the Plaintiff submitted that the agreement was a Mudarabah agreement governed by Sharia law, and that the intention of the parties was to do business together and to share in the proceeds of the business as provided under the Sharia law. He added that Shariah law is governed by the Quran, and the Chapter 2 verse 275 provides that Allah has permitted trade but forbidden usury. That since the title of the agreement was a Mudarabah agreement, it is governed by Sharia law.

Counsel also cited Regulation 11 (3) (c) of the Financial Institutions (Islamic Banking) Regulations which defines equity financing including mudarabah as a profit sharing partnership where capital is provided by the financial institution to its customer, and its managed and applied by the customer for a specific purpose and profits arising are shared between the financial institution and the customer. He therefore concluded that it was wrong to cap mark-up before the 1st Plaintiff had declared any profits.

In reply, it was submitted for the 1st Defendant that there was no clause in the agreement that entitled the parties to share the losses and profits of the business, that the only obligation under the agreement was that the 1st Plaintiff was to pay UGX 303,000,000/ being cost price plus mark-up of 10% annually in the agreed period of 36 months. That DW2 stated the same in paragraph 29 of her witness statement and confirmed that the mark-up which is equated to interest in conventional banking is predetermined. He also added that the 1st Defendant is not regulated by Bank of Uganda.

Counsel added that PW1 failed in cross examination to refer Court to a clause on profit sharing in the agreement. He cited Clause 4 (b) of P. Exh 3 the Murabaha agreement which indicated that the 1st Plaintiff was to reimburse the 1st Defendant the cost of purchasing the machine and maternity bed unit plus 10% mark-up per annum in instalments. He then submitted that the 1st Defendant was entitled to mark-up from the 1st Plaintiff before any profit could be declared by the 1st Plaintiff as it was not one of the conditions stated in the agreement.

Under the terms and repayment in Clause 4 of P. Exh 1, the Offer letter, the facility would be available for 36 months from the date of disbursement, and that payment of the investment capital would commence in the 3rd month while the mark up

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payment would begin in the \$1st month for 3 months. Clause 4 (b) was to the effect that the customer would reimburse MSC the cost of purchasing a fully automated clinical chemistry machine and maternity bed unit plus a mark-up of 10% per annum in instalments by issuing 36 cheques.

Mark up was defined in the key terms in P. Exh 1 to mean 'the surplus or profit that the customer agrees to pay to the MSC over and above the total cost price of the equipment to be purchased.' Therefore, from Clause 4 (b) above, it was not only the profit that the 1st Plaintiff was required to pay, they were to reimburse the purchase price of the automated machine and maternity bed. The mark-up was to be paid in addition to the reimbursement. The evidence on record suggest that the 1st Defendant defaulted on the reimbursement as well, not only the 10% mark-up payment which according to Clause 4 (b) was to be paid for 3 months.

Subsequently, the 1st Plaintiff cannot hide behind their failure to pay basing on the non- declaration of profits. They also failed to make payments for reimbursing the purchase price of the machine. In addition, the parties entered into a Murabaha agreement provided for under *Regulation 11 (2) (c) and 11 (5) of the Financial* Institutions (Islamic Banking) Regulations No.2 of 2018, different from a mudarabah agreement which is a profit and loss sharing venture. PW1 admits to having failed to repay the loan and even said they had requested that the loan be rescheduled. Therefore, since mark-up was defined to mean surplus or profit, in this case where the agreement was not a profit sharing agreement, the mark-up was surplus over and above the purchase price of the machine.

From the fore going therefore, I find that the 1st Defendant was entitled to mark up before the 1st Plaintiff declared any profits.

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As to whether the 1st Defendant was in breach of the Murabaha agreement when it sanctioned the sale of the suit property, it was submitted for the 1st Plaintiff that since the agreement is governed by Sharia law, it was a profit sharing arrangement. He quoted the 4 principles of Islamic banking among which was the prohibition of interest (riba or usury) and added that the 1st Defendant does not have any basis for the claim of UGX 288,406,966/ because the 1st Plaintiff had been given a facility of UGX 303,000,000/ and that PW1 said in paragraph 15 of her evidence in chief that by 18th July 2019, UGX 96,509,570/ had been paid to the 1st Defendant, meaning that the \$1st Defendant was only entitled to recover UGX 206,490,400/.

Counsel added that there was no mode of recovery agreed upon in P. Exh 3, and that, what was explained to the 1st Plaintiff was for the 1st Defendant to share in the business profits at the rate of 10% of the profits made from the assets acquired with the financial

facility. He added that recovery was to be through the sale of the assets acquired and that it was the reason why the money was paid direct to the supplier to ensure that the right assets were acquired. Counsel also stated that there was no provision in P. Exh 3 for the sale of the security given by the 2nd Plaintiff without his consent in the case of default. He added that if it had been the intention of the parties, they would have stated so, therefore that the 1st Defendant breached the facility agreement when he sold of the 2nd Plaintiff's property without his consent as required for sale by private treaty according to Section 28 (1) (d) of the Mortgage Act.

In reply, Counsel for the 1st Defendant submitted that it is PW1's undisputed evidence that the 1st Plaintiff provided property and that there was no clause in the offer letter or the agreement requiring the 1st Defendant to first seek the consent of

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the 1st Plaintiff to sell the mortgaged property. That DW2 said in cross examination that it was implied that the mortgaged property would be sold in the event of default under the Mortgage Act, and that there was no need for an express provision to that effect. In relation to Sharia law, Counsel cited the Quran and submitted that the Sharia law acknowledges creation of mortgages as security or collateral for payment of a debt and that it is on that basis that the 1st Defendant required the 1st Plaintiff to provide security under Clause 6 (a) of P. Exh1 and Clause 3 (a) of the P. Exh 3.

He added that a mortgage deed was created and personal guarantees also executed. He concluded that Sharia law allows for sale of mortgaged property upon default of the mortgagor without seeking consent of the mortgagor. He also submitted that the parties did not state that recovery was through the sale of the acquired assets because if it were so, the asset acquired would have been the security. That Clause 15.05 of P. Exh 3 is to the effect that the agreement would be governed by Sharia law and the laws of Uganda, which Counsel submits that the Mortgage Act is part, therefore that the 1st Defendant was not wrong in invoking it to give effect to the agreement upon default.

Counsel also added that the sale was not by private treaty as claimed by the 1st Plaintiff. He referred to the witness statement of PW2 under paragraphs 21, 22 and 23 where she said that the sale was by public auction, which did not require consent of the 1st Plaintiff. He concluded that the 1st Defendant was not in breach of the Murabaha agreement when it sanctioned the sale of the security property without the consent of the Plaintiffs, as it followed the due process of foreclosure.

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In resolving this issue, ordinarily, P. Exh 3 should have provided for how to recover in case of default, however, this is not so. Clause 9.02 of the Agreement provides:

"*Notwithstanding anything contained herein, MSC may without prejudice to any of* its other rights, at any time after happening of an event of default by notice to the client declare that entire amount by which the client is indebted to MSC shall *forthwith become due and payable.*"

From the above clause, the 1st Defendant had the right to declare the entire amount due after the happening of any event of default. PW1 in paragraphs 16 and 17 of his witness statement admits failure to repay the facility by the 1st Plaintiff which is an event of default under Clause 9.01 (b) of P. Exh 3. Now that it is not disputed that there was default by the 1st Plaintiff in repaying the facility, the issue now is whether the mode of recovery applied by the Defendants was permissible under the agreement entered into by the parties.

This Court must first decide whether or not the Mortgage Act applies to the agreement entered into by the parties, and if so, whether or not the sale was by private treaty which required consent of the Plaintiffs. Clause 15.03 of P. Exh 3 provides:

"This Agreement is governed by and shall be construed in accordance with Shariah Law and the Laws of Uganda. All competent courts of Uganda shall have the non-exclusive jurisdiction to hear and determine any action, claim or proceedings arising out of or in connection with this Agreement."

Therefore, from the above Clause, it is clear that there is no exclusive application of the Sharia law, but that the agreement would be construed in accordance to both Sharia law and the Laws of Uganda. Whereas the parties did not produce a

Mortgage Deed in their trial bundles, DE1 the search letter from Ministry of Lands dated 1st April 2019 reflects a mortgage to the 1st Defendant as the only encumbrance on property to secure repayment of UGX 303,000,000/, which is the facility granted to the 1st Plaintiff in P. Exh 3. Therefore, I can rightly say that the parties executed a mortgage deed which was duly registered to secure the facility: the Plaintiffs do not dispute the same. Therefore, the Agreement will also be construed in accordance with the Mortgage Act in addition to Sharia Law.

Since the Agreement is silent on the mode of recovery, and it is governed by the Mortgage Act; it is for this reason that a notice of default dated 16th April 2019 (DE 2) was issued by the 1st Defendant pursuant to Section 19 of the Mortgage Act 2009 requiring the 1st Plaintiff to settle the entire principal loan balance of UGX 288,406,966/ within 45 days. Under Section 20 (e) of the Mortgage Act, the mortgagee may sell the mortgaged land when the mortgagor is in default and fails to comply with the notice.

In the premises, the 1st Defendant did not breach the Murabaha Agreement when it sanctioned the sale of the mortgaged property, as the 1st Plaintiff failed to comply with the notice served under the Mortgage Act, and the Murabaha Agreement is equally governed by other Laws of Uganda in addition to Sharia Law.

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As to whether sale of the suit property below the forced sale value is illegal, it was submitted for the Plaintiffs that the forced sale value of the property was UGX 500,000,000/ according to P. Exh 5 and P. Exh 6 dated on 27th April 2016 before the loan was advanced carried out by the 1st Defendant and on the 2nd day of June 2016 carried out on the instructions of Centenary bank. That with the developments on the land and completion of the buildings, a valuation by Earnest

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Registered Valuers marked P. Exh 11, forced sale value was at UGX 800,000,000/ and market value at UGX 1,100,000,000/. He added that DW3 admitted to not visiting the scene before signing P. Exh 6.

Counsel referred to the Mortgagee's duty under Section 27 (1) of the Mortgage Act 2009 to take all reasonable steps to obtain the best price for mortgaged property, to submit that the valuation report that the 1st Defendant relied on to conduct a sale was illegal. That the sale was only intended to benefit the 2nd Defendant and that he was given more than 60 days to pay instead of 21 days under the Act. That the suit property was also transferred to him before completion of payment, to the detriment of the Plaintiffs. He added that the sale violated Regulation 11 of the Mortgage Regulations which requires valuation of the property before sale as the valuation presented was for Plot 126 not Plot 182.

In reply, Counsel for the 1st Defendant started by pointing out that this issue had been merged with Issue No. 4. Nevertheless, he submitted DW3 said that upon issuing a notice of sale on 9th January 2019, the 1st Defendant instructed CMT Realtors Ltd to value the property and D. Exh 6 was made. That the 2nd Defendant emerged the highest bidder on the day of sale and the property was sold to him. That the property was inspected on 25th March 2019 through agent Doreen Agaba, who drafted the report which was then reviewed by registered valuers of CMT Realtors. That Plot 126 instead of 182 was a typo which is explainable by aspects of the report which were unchallenged. That Clause 7 captures the right plot number, and that the pictures in the report as well as the location in Clause 5 were never challenged.

Counsel added that D. Exh 6 was made by valuers not on the list sent to the Plaintiffs, therefore, that it was not made under the instructions of the 1st Defendant.

Hence their figures and content cannot be considered since it contravenes **Regulation 11 (1) of the Mortgage Regulations**. Therefore, that the 1st Defendant fulfilled all the requirements under the Mortgage Act by conducting valuation which returned forced value at UGX 480,000,000/ and the property was sold at UGX 480,210,000/.

As rightly pointed out by Counsel for the Plaintiffs, pursuant to Section 27 (1) of the Mortgage Act 2009, a mortgagee who exercises his power to sell mortgaged property owes a duty of care to the mortgagor to take all reasonable steps to obtain the best price as prescribed in the regulations. Further, Regulation 11 of the Mortgage Regulations requires a mortgagee to value mortgaged property to ascertain the current market price and forced sale value before selling the property, and that the report should not be more than 6 months before the sale.

Whereas the Plaintiffs claim that the 1st Defendant violated the Mortgage Act by selling below the forced sale value of the property and without valuing the property before sale hence making the sale illegal, the 1st Defendant claims to have instructed the Valuers who made a report D. Exh 6. Looking at the first page of D. Exh 6 on page 22 of the Trial Bundle, the name of the client is Micro Finance Support Centre, the 1st Defendant. Therefore, it can be rightly said that the 1st Defendant carried out valuation of the property and what should be considered is whether the report is valid.

The 1st Plaintiff claims that the said report was made in respect to a different property Plot 126, not the suit property 182. It is true that D. Exh 6 consistently named the Plot Number as 126, right from the cover page of the report on page 22 of the 1st Defendant's Trial Bundle, then under the property address in Clause 1.0 and the terms of reference in Clause 2.1. However, the right Plot Number 182 is

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mentioned in the Plot area description after Clause 7.3. I am mindful that the author of a valuation report has a duty of care to establish its truthfulness before signing it and issuing it (See DFCU Bank Ltd V Yudaya Mukibi & Others HCCS No. 195 of 2012). Therefore, DW3 ought to have verified the plot numbers before signing, however, that was not done, hence the error.

Since the right plot number appeared in the plot description and since the 2nd Plaintiff is not known to own another property under Plot 126, I will take the 126 as a typo because there is no other property that was offered as security except the said Plot 182. In addition, the other parts of the report including the pictures in Clause 8 and the location of the property describe property at Plot 182. Also since the document should be construed as a whole, it is my considered opinion that 126 was a typo which should be considered so.

Under Clause 1.0 of the Report (D. Exh 6), the market value of the property was at UGX 800,000,000/ while the forced sale value was UGX 480,000,000/; therefore, I find that Regulation 11 (1) of the Mortgage Regulations was fulfilled. As to whether the report is not made more than six months before the date of sale, still under clause 1.0 and clause 4.0 it can be seen that the property was inspected on 25th March 2019 and the report was made on 1st April 2019. According to the sale agreement (P. Exh 13), the property was sold on the 19th day of July 2019 which is less than six months from the date of the report in April. In the premises, I find that the 1st Defendant was also compliant with the requirement under Regulation 11 (2) of the Mortgage Regulations.

Now that it has been found that the property was valued before sale, the next issue is whether it was sold below the forced sale value. According to D. Exh 6, the forced sale value of the property was UGX 480,000,000/ and Clause 8 of the sale

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agreement P. Exh 13 shows that it was sold at UGX 480,210,000/, slightly above the forced sale value. Also looking at D. Exh 5, a copy of the advertisement of the notice of sale, I find that the 1st Defendant took reasonable steps to obtain the best price by advertising the sale as required by Section 27 (1) of the Mortgage Act 2009; therefore, the sale was not unlawful.

An issue of DW3 signing the report without visiting the scene was raised, however, I find that this was properly explained in the report (D. Exh 6) under Clause 4.1 that the property was inspected by Doreen Agaba who also drafted the report, which was then reviewed by Godfrey Omondi and Michael Oballim the registered Valuer and director of CMT Realtors Limited. Therefore, this should not be an issue, because the property was inspected and a report made.

In the premises, I find that the property was not sold below the forced sale value, and the sale was not contrary to the Mortgage laws.

Issue 5

Regarding whether there is a valid sale of the mortgaged property, it was submitted for the Plaintiffs that the sale was invalid because the notices required to be issued by a mortgagee under the Mortgage Act which the 1st Defendant produced as D. Exh 2, 3 and 4 were never served on the Plaintiffs. That the only notice served on the 1st Plaintiff was P. Exh 8 issued by the 1st Defendant's agent requesting them to vacate the property. Counsel added that the property was disposed of by private treaty without the consent of the 2nd Plaintiff yet under Islamic banking the 1st Plaintiff and 1st Defendant are partners in business. That the advert said the sale was by public auction and private treaty, and that there was no auctioning or bidding, and that the advert was published on 18th July 2019, a day before the sale.

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He added that payment of the property was made outside the 21 days on the terms of the 2nd Defendant in contravention of Regulation 14 (3) of the Mortgage Regulations, and that property was transferred without completion of payment. That no evidence was produced to show that the price balance was paid, therefore that the Defendants want to create a sale that did not happen to deprive the 2nd Plaintiff of his property. Finally, Counsel submitted that P. Exh 13 is unenforceable as it does not have a Jurat yet the 2nd Defendant said he cannot read and write therefore it contravenes Sections 3, 4 and 5 of the Illiterates Protection Act. Also that during cross examination he said by the time of execution of the said agreement he had only paid UGX 191,000,000/ not the UGX 300,000,000/ stated in the agreement.

In reply, it was submitted for the 1st Defendant that upon default on their obligations by the 1st Plaintiff, a notice of default (D. Exh 2) was issued and served upon the 1st Plaintiff, and that upon failure to rectify the default, then the notice of sale (D. Exh 3) was issued, and eventually the advertisement was made in D. Exh 5. In relation to seeking consent, Counsel submitted that the parties were not in a partnership as alleged by the Plaintiffs, and he added that the sale was by public auction pursuant to Section 26 of the Mortgage Act and Regulation 8 of the Mortgage Regulations therefore that there was no need to seek consent of the Plaintiffs before the sale. Counsel added that the Plaintiffs want to mislead Court that the sale was one day after the advertisement, because PW1 clearly stated under paragraph 17 of his witness statement that the property was advertised in the Daily Monitor of 9th April 2019, not 18th July 2019 as alleged.

In relation to payment of the purchase price, Counsel submitted that DW2 clearly stated that the 2nd Defendant paid UGX 300,000,000/ being partial consideration evidenced by D. Exh 7, and that the balance was paid before the property was

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transferred. That DW4 confirmed making the payment. He submitted that Regulation 14 of the Regulations is not mandatory and that under Regulation 16, a sale cannot be vitiated by any irregularity in conducting the sale by public auction. Finally, in relation to unenforceability of the sale agreement, Counsel referred to DW4's evidence in cross examination that the transaction was handled by his manager and lawyer who explained to him the contents of the agreement before he appended his signature. That it would be absurd if Court declared the agreement unenforceable yet it was between two consenting adults and that none of the parties was prejudiced by the said non-compliance.

It was submitted for the 2nd Defendant that a purchaser is protected under Section 29 of the Mortgage Act except in the case of fraud, misrepresentation or other dishonest behaviour. That the 2nd Defendant put his bid after conducting due diligence and emerged the best bidder. Counsel also referred to Regulation 16 where a sale is not vitiated by irregularities. In relation to him being illiterate, it was submitted that the 2nd Defendant understood the agreement and that he is the beneficiary and not the parties complaining. Counsel added that a mistake by Counsel in failing to include a certificate of translation cannot be vested on the client, and that it is curable by Article 126 (2) (e) of the Constitution.

I have duly considered the submissions of both Counsel on all the issues raised, I will handle them in the order that they were raised, starting with the requirement of the notices. Having looked at D. Exh 2, 3 and 5, it is not in dispute that the said notices were issued by the 1st Defendant pursuant to Sections 19 (2), 26 (2) of the Mortgage Act and Regulation 8 (2) of the Mortgage Regulations; however, what seems contentious is that they were not served upon the 1st Plaintiff. Counsel for the 1st Defendant claims that the said notices were served, and referred to D. Exh 4 as proof of service. I have looked at the said D. Exh 4, and find that whereas it

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does not specify what kind of letters were sent by post, it is dated 17/04/2018, a day after D. Exh 2 was written, therefore, it is probable that D. Exh 2 was among those documents served by post. Therefore, it can be said that a notice of default was duly issued and served on the 1st Plaintiff. However, there is no proof of service of D. Exh 3, the notice of sale. D. Exh 5, the advert was however made.

In relation to seeking consent of the Plaintiffs before sale, we must first establish if the sale was by private treaty which required consent. Looking at D. Exh 5, the advert, whereas the heading indicated public auction or private treaty, the content of the advert is for a sale by public auction. Whereas no report on the bids was presented, all evidence shows that the sale was by public auction. PW1 under paragraph 17 of his witness statement made reference to the advert (annexure \$G\$) which shows that the advert was made in the Daily Monitor newspaper of 9th April 2019, and the sale agreement P. Exh 13 is dated 19th July 2019, which is 21 days after the notice so it complies with the provisions of Regulation 8 (4) of the Mortgage Regulations. Therefore, upon being satisfied that the sale was by public auction, there was no need for consent as alleged by the Plaintiffs.

In relation to unenforceability of the sale agreement (P. Exh 13) for lack of a jurat, and that Court cannot enforce an illegality, it is true that the 2nd Defendant admitted that he cannot read and write, however, he also said during cross examination that the lawyer interpreted for him the contents of the agreement and that he knew what he was signing. The purpose of the Illiterate Protection Act is stated in its preamble as 'an act for the protection of illiterate persons.' I am inclined to agree with Counsel for the 1st Defendant that this instant case is distinguishable from that of Kasaala Growers Co-operative Society V Kakooza & Another SCCA No. 19 of 2010 because the illiterate person who is protected by that Act, in this case gave evidence that the agreement was explained to him and

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that he knew what he was signing. Therefore, I find no reason to declare the agreement unenforceable.

Whereas there was no jurat, the 2nd Defendant admits to knowing the contents of P. Exh 13, therefore it cannot be declared unenforceable. Provisions of the Illiterates Protection Act should be used as a shield to protect an illiterate person but not used against them. Therefore, I find that P. Exh 13 is enforceable. Subsequently, considering the above and also considering the protection of a purchaser under Section 29 of the Mortgage Act, I find that the sale of the mortgaged property was valid.

Issue 6:

Having found that the 1st Plaintiff was in breach of its contractual obligations at the time of sale, that the 1st Defendant was entitled to mark-up from the 1st Plaintiff before profits were declared, and that the 1st Defendant was not in breach of the Murabaha facility when it sanctioned the sale of the property, and also that there was a valid sale of the property, the suit is hereby dismissed with costs to the Defendants.

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HON, LADY JUSTICE ANNA B. MUGENYI

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Prepared on 14 October 2026 · Esheria