

UGANDA / JUDGMENT

Nkugwa v Centenary Rural Development Bank Limited (CIVIL SUIT NO. 165 OF 2016) [2019] UGHCCD 255 (17 May 2019)

[2019] UGHCCD 255

COURT

HC: Civil Division (Uganda)

BEFORE

Mugambe, J

CASE / FILE NUMBER

CIVIL SUIT NO. 165 OF 2016

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA CIVIL DIVISION CIVIL SUIT NO. 165 OF 2016**DANIEL NKUGWA..... PLAINTIFF****VERSUS****CENTENARY RURAL DEVELOPMENT BANK LIMITED..... DEFENDANT****JUDGMENT****BEFORE: LADY JUSTICE LYDIA MUGAMBE****Introduction**

- 1. The Plaintiff filed this suit against the Defendant for; (a) an order stopping the sale of the Plaintiff's properties comprised in plot 174 block 364 land at Wakabuzi; plot 237, block 364 land at Wakabuzi, and a Kibanja in Kireka Bbira Musaale Zone LC1; (b) in the alternative an order to only dispose of one property to cater for the outstanding balance but not all the three properties; or in further alternative an order directing the Defendant to reschedule the loan due to the increased rate; (c) punitive damages; (d) general damages; (e) interest on (c) and (d) of 20% from the date of judgment till payment in full and (f) costs of the suit.
- 2. The Plaintiff was represented by Mr. Robert Irumba of M/s. Tumusiime, Irumba & Co. Advocates & Solicitors and the Defendant was represented by Mr. Andrew Munanura Kamuteera of M/s. Sebalu & Lule Advocates.

- 3. It was the Plaintiff's case that on 8th October 2014, he obtained a commercial loan of Ug. shs: 100,000,000/= (Uganda shillings one hundred million only) from the Defendant and mortgaged his properties above as security for the said loan. He made part payments in offsetting the loan amounting to Ug. Shs. 45,043,230/= (Uganda shillings forty five million forty three thousand two hundred thirty only), leaving a balance of Ug. Shs. 54,956,770/= (Uganda shillings Fifty four million nine hundred fifty six thousand seven hundred seventy) at the time.
- 4. In a letter dated 1st October 2015; the Defendant changed the prime lending rate from 21% to 23% which transcended to paying monthly instalments of Ug. shs. 5,840,157/= from Ug. Shs. 5,418,361/=. Owing to the increased monthly payments and financial constraints, he approached the Defendant on several occasions to have the loan rescheduled but all in vain. To his dismay, the Defendant without issuing the mandatory notices of intended sale as envisaged in the mortgage Act, wrote through its agents Vian auctioneers & court bailiffs demanding the outstanding amounts and subsequently advertised the sale of all three mortgaged properties to recover Ug. Shs. 54,956,770/= despite the said properties having the value of over Ug. Shs. 200,000,000/= (Uganda shillings two hundred million) yet half of the loan had already been serviced by the Plaintiff.
- 5. Further that the Defendant was unjustly aiming at enriching itself by selling all the mortgaged properties yet fifty percent of the loan had already been serviced while a single property out of the three would cater for the balance of the loan if sold.
- 6. In its written statement of defence, the Defendant contended that the Plaintiff defaulted on his loan obligations by failing to pay the loan instalments despite several reminders prompting the Defendant to commence the recovery process agreed under the agreement. It was selling the Plaintiff's property lawfully to recover all the money that was lent to him. The prime lending rate was changed in accordance with clause 7(ii) of the loan agreement and the plaintiff was notified about the increment. The Plaintiff was still indebted in the sum of Ug. Shs. 55,963,468/= and the penalties for late payment attract further interest on a daily basis. All the properties were pledged as security for the loan and are subject of sale in the event of default to recover the full amount outstanding.
- 7. In a joint scheduling memorandum, the issues agreed for resolution were:
 - i. Whether the Defendant can foreclose or attach all the three properties of the Plaintiff for the recovery of the loan balance due.
 - ii. What are the remedies available to the parties?
- 8. The Plaintiff wrote a letter to the Defendant on 18th September 2017, communicating a desire to settle the issues out of court which the Defendant wrote back on the 20th

September 2017 agreeing to the proposal to pay Ug. Shs. 60,000,000/= (Uganda shillings sixty million) provided it was paid in one lump sum. However this money has never been paid to date.

- 9. The Plaintiff claimed that he is willing to pay the said outstanding balance of Ug. shs. 60,000,000/= but due to the current economic situation and the fact that he is currently undergoing financial constraints, he requested to be allowed to pay in instalments of Ug. Shs. 5,000,000/= (Uganda Shillings Five Million) per month till payment in full but the bank is still reluctant to accept his request.
- 10. The Plaintiff urged that he would have started depositing moneys in fulfilment of the said loan balance but since there has been no formal consent executed between the parties, and also given the fact that the plaintiff's account held with the Defendant was still reading an outstanding loan balance figure disputed by him, any deposits made on that account would be deducted based on the disputed figure.

The Plaintiff also argues that the delay in payment was partly due to the misplacement of the court file for over a year. He tried to ask court to open a duplicate file but it never did so until the file was discovered late this year.

Relevant clauses between the Plaintiff and the Defendant

- 11. Under clause A 7(ii) of the agreement between the plaintiff and the defendant which is tendered as annexure 'A', it is stated that; **Interest will accrue on daily outstanding balances and will be applied on the last working day of each month in arrears, however the bank reserves the right to apply interest at periods shorter than one month. The bank further reserves the right to change interest applicable at its sole discretion depending on the changes in the market conditions and the risk rating of the facility. (Emphasis mine).**
- 12. Clause E 4(i) on cost expenses and fees in the same agreement, it is stated that; "the borrower agrees that all costs and expenses whatever including legal and auctioneers costs connected with the recovery or attempted recovery of monies owing under the facility as well as the contesting of any involvement in any legal proceedings of

whatsoever nature by the bank for the protection of or in connection with any account(s) or assets of the borrower shall be payable by the borrower on demand, on a full indemnity basis, together with interest from the date the costs and expenses are incurred to the date of full payment at such rate as the bank may prescribe (both before and after judgment)".

- 13. Under the same clause E 4 (ii) the bank has the right at any time to debit the borrower's account with interest, commission, charges, fees and all monies arising from the facility as paragraph (i) payable by the borrower. No such debiting shall be deemed to be a payment of the amount due except to the extent of any amount in credit in the borrower's account(s) or a waiver of any event of default under any agreement relating to the facility. If such debiting causes the borrower accounts to be over drawn beyond the permitted limit, interest and any other applicable charges shall be payable accordingly.

Analysis

- 14. I have looked at all the pleadings and submissions. It is not in dispute that the Plaintiff has defaulted on the loan he borrowed from the Defendant. Out of the Ug. Shs.100, 000,000/= borrowed he paid Ug. Shs. 45,000,000/= and there's an outstanding balance of Ug. Shs: 60, 000,000/= according to annexure A- the banking facility agreement between the Plaintiff and the Defendant. This balance has remained unpaid for over two years, despite several demands from the Defendant and commitments to new payment plans from the Plaintiff.
- 15. Instead of clearing the loan balance in part or whole, the Plaintiff sued the Defendant and now challenges the planned sale of the mortgaged property claiming that since he paid part of the loan only one of the properties should be sold. However, this sale of one of the properties was not provided for in the mortgage agreement and there's no reliable proof that sale of one of the mortgaged properties can cover the loan balance.
- 16. In spite of entering new payment plans the Plaintiff has still failed totally to pay the loan balance. The Defendant bank now is disagreeable to any instalment payments and wants the Ug. Shs.60, 000,000/= balance paid at once or it sells off the mortgaged property to recover it.
- 17. In the circumstances of this case, the Plaintiff should not have attempted to intimidate the Defendant bank he owed money with court action. Rather he should have embarked on paying up the loan balance. This court is mindful that banks operate businesses and the Defendant bank needed its money to keep in business so it is entitled to interest on the said balance. For the inconvenience of this suit and continued failure to pay the balance the Defendant is also entitled to damages and costs follow suit.
- 18. Based on the above, the Plaintiff's suit is moot and dismissed with costs for the Defendant. The counter claim succeeds. The Plaintiff must pay the Ug. Shs. 60,000,000/= balance within 7 days from this judgment.
- 19. In case of failure to pay, the Defendant is entitled to sell off the Plaintiff's mortgaged property and where the sale is done, any balance after deducting the Ug. Shs. 60,000,000/= loan balance and related expenses is to be given to the Plaintiff. The Defendant is awarded general damages of Ug. Shs. 20,000,000/=.
- 20. Interest on the Ug. Shs. 60,000,000/= balance is awarded at 15% per annum from 20th September 2017 till payment in full. This is the date the Plaintiff had agreed to pay the 60 million as balance. The Defendant is also awarded costs of both the counter claim and Plaintiff's suit.

I so order.

Lydia Mugambe Judge 17/05/2019

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