

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
[CORAM: Owiny-Dollo DCJ., Egonda-Ntende & Obura, JJA]

CIVIL APPEAL NO. 50 OF 2004

(Arising out High Court Civil Suit No.835 of 1999)

BETWEEN

LUYIMBAZI SULAIMAN.....APPELLANT

AND

UGANDA COMMERCIAL BANK.....RESPONDENT

[On appeal from a judgment of the High Court of Uganda, Commercial Court Division, (Arach-Amoko J., (as she then was)), of 23rd September 2003]

Judgment of Egonda-Ntende JA

Introduction

1. The appellant filed the original suit against the respondent seeking multiple reliefs, including a declaration that the mortgage between the appellant and respondent was not properly executed; that the sale of land comprised in LRH Volume 1562 Folio 24 Block 262 Plot 444 Mobuto Road, Makindye be rendered null and void, general damages for breach of trust and contract, and special damages to be awarded to the appellant. The suit was dismissed with costs.

2. Dissatisfied with the judgment of the trial court the appellant appealed to this court and set forth the following grounds;

(1) That the learned trial judge erred in law and fact in holding that there was a valid demand on the appellant to pay the overdraft

(2) That the learned trial judge erred in law and fact in holding that demand was not necessary in the circumstances

(3) That the learned trial judge erred in fact in finding that the appellant received notices prior to the instructions to evict the appellant's tenants from the suit property and to sell the same.

(4) The learned trial judge erred in law and fact in finding that the suit property was validly sold.

(5) The learned trial judge misdirected herself in relying on unsubstantiated evidence to hold that the property was advertised and valued before sale.

(6) The learned trial judge erred in law and fact in finding that there was no fraud or bad faith on the part of the respondent.'

3. The appellant was represented by Mr. William Kyobe and the respondent by Dr. Joseph Byamugisha. The parties agreed to file written submissions.

Submissions of Counsel

4. Counsel for the appellant submits on ground one and two jointly. He contends that no copy of the notice of eviction of the appellant's tenants was served on the appellant directly. That upon eviction of the tenants in December 1998, no copy of eviction order was served on the appellant from the auctioneers. That in 1999, the appellant received a copy of the demand notice addressed to the borrower through the LC II of the area. That letter was not directed to the appellant as it ought to have been. That the appellant made a complaint of not receiving direct communication on the matter in a letter to the respondent marked exhibit 02. That the appellant further testified that in the meeting that took place on 24th February 1999 at the

respondent's headquarters, an apology was put forward to the appellant for not having been copied on the letters / notices directly.

5. Counsel for the appellant submits that all communications relating to the overdraft and the sale of security were made to the borrower and not the appellant despite the appellant's repeated demands for communication on the matter. He relies on section 116 and section 202 of the Registration of Titles Act for the proposition that the mortgagee is mandated to serve the mortgagor notice to pay the money owing on the mortgage. He also relies on the case of Uganda Credit And Savings Vs Eriyazali Senkuba [1966] EA 50.
6. Counsel for the respondent submits that ground 2 is misconceived because the learned trial judge held that the demand was necessary though not a requirement under the mortgage deed. On the first and third grounds, counsel for the respondent submits that the facts the appellant is relying on are not the facts as found by the learned trial judge. He further submits that it was never an issue nor one of the grounds that the notices sent or copied to the appellant did not satisfy section 202 of the Registration of Titles Act.
7. In relation to grounds 4 and 5, counsel for the appellant also submits that Clause 5 of the mortgage deed is contrary to the law, in particular, sections 116 and 202 of the Registration of Titles Act and section 10 of the Mortgage Act which render the clause void in so far as it is inconsistent with the law.
8. That a valid sale follows an advertisement and if no sale takes place that day of the notice, the advertisement ought to be repeated. That the evidence on record shows that the purported advertisement for sale took place in October 1998 yet the sale was conducted in April 1999. That the valuation report was not adduced in court by the respondent as evidence and the auctioneer sold the property before the appellant was allowed to exercise his rights as a mortgagor.
9. In reply counsel for the respondent submits that the validity of the sale was never an issue at the trial court hence this ground is unlawfully before this court. In answer to the fifth ground, counsel for the respondent also submits that the valuation and advertisement before the sale was not an issue at the trial court and the learned trial judge did not make a finding on the matter.

10. On ground 6 counsel for the appellant contends that the respondent appointed an auctioneer prematurely in bad faith who evicted the appellant's tenants without notice. That upon eviction, the respondent took possession of the respondent property till sale and failed to carry out its duties of a mortgagee in possession under Section 7 of the Mortgage Act Cap. 229. That the respondent sold the security without advertising as required by the law.
11. Counsel for the appellant further submits that in 1999, the respondent gave the appellant an opportunity to pay off the outstanding sums but recruited an auctioneer company to sell off the property upon failure to fulfil the proposal. Most of the communications were made to the borrower instead of the appellant despite repeated pleas of direct communication with him. The only letter directly addressed to the appellant, Exhibit P11, was not delivered to him on time.
12. Counsel for the appellant relies on the case of Yosia Sajabi vs Musa Umar Amreliwalla (1956) 23 EACA 71 for the submission that the mortgagee ought to act in good faith and sale at a reasonable price while exercising its power of sale to realise the mortgage. He quotes Paget's Law of Banking 11th Edition page 611 to support this submission and the case of Cooperative Bank Limited in Liquidation V Shell Kasese Services Ltd H.C.C.S No. 140 of 2005 (unreported).
13. In reply counsel for the respondent submits that the appellant has introduced fresh particulars of fraud or bad faith that were not pleaded. He relies on Order 6 rule 7 of the Civil Procedure Rules that bars litigants from departing from their pleadings. He also cites Order 6 rule 3 that requires particulars of fraud to be pleaded in all cases where fraud is a cause of action. He supports this submission with the case of Kampala Bottlers Ltd V Damanico (U) Ltd Supreme Court Civil Appeal No. 22 of 1992 (unreported).

ANALYSIS

14. This is a first appeal. This court is required to re-evaluate the evidence and come up with its own findings pursuant to Rule 30 (1) of the Rules of this Court. See Fr. Narcensio Bemugisa & Ors vs Eric Tibebaaga Supreme Court Civil Appeal No. 17 of 2002, (unreported). I shall proceed to do so.
15. The brief facts of this case are that Princess Victoria Nabaloga together with Prince Captain Jjuko Walugembe, a director of J.W. Victoria Agro Industries Limited asked the plaintiff for assistance with a land title to secure a loan with the respondent. The appellant deposited his land title to Block 262, plot 444 located at Mobutu Road, Makindye with the respondent. A mortgage was executed on the property and the respondent extended an overdraft of UGX 5,000,000 to J W Victoria Agro Industries Ltd.
16. The company, however, defaulted on its loan payment despite repeated demands from the bank. Consequently the respondent sold off the property in April 1999. The appellant being aggrieved instituted H.C.C. S No. 835 of 1999 before the High Court of Uganda at Kampala. During the trial, the appellant was the sole witness for the plaintiff while the respondent summoned two witness; Eldad Kansiime (DW1), the General Manager Credit and Collections and Betty Rukyalekere(DW2), The General Manager Administration of the respondent bank.
17. The following were the issues agreed upon by the parties for determination.
 - 1) Whether the mortgage was valid or not;
 - 2) Whether the defendant made a demand on the plaintiff and whether such a demand was necessary under the circumstances;
 - 3) Whether the mortgage deed was varied by the parties;
 - 4) Whether there was fraud and or bad faith on the part of the defendant;
 - 5) Whether the plaintiff is entitled to the remedies prayed for in the plaint.
18. All the issues were determined in favour of the respondent and the learned trial judge dismissed the suit with costs to the defendant.

Grounds 1, 2 & 3

19. Grounds 1, 2 & 3 will be considered together as they are related. PW1, the appellant at page 11 of the record of proceedings testified that;

‘In November 1998, I received a copy of a letter which was written to the company J.W. Victoria Agro Industries Ltd by UBC. The copy I received was copied to the Chairman LCII of that area, giving notice of eviction of the tenants of the premises and giving the company notice to repay the money within a certain date...’

20. The appellant testified that he is a Councillor at Makindye Division LCII. He testified in court that he received the eviction notice because he was the Chairman LCII of the area. It is therefore untenable for the appellant to allege that he did not receive an eviction notice. The capacity in which he received the notice was fortuitous. Nevertheless it turned out that he was the owner of the property in question. The notice prompted him to take action. In his testimony he stated that upon receipt of the notice, he ran to the residence of Prince Jjuko and asked him why he had failed to pay the loan.

21. The appellant further testified that he received a copy of a letter (Exhibit D3) giving notice of 7 days to sell off the property which he had offered as security. This letter was addressed to J.W. Victoria Agro Industries Ltd. Some of the salient features of the letter state as follow;

‘As you are aware the loan is long overdue and you have not made any efforts to settle the loan despite repeated demands made to you.

Regrettably your proposal to settle the loan has also not been fulfilled.

In the circumstances, the bank is to request you to settle the amount outstanding plus all the interest due, as will be advised by the Chief Manager, City Branch, within 7 days from the date of this letter.

Failure to comply will leave the bank no option but to sell the mortgaged property without further recourse to you. You are aware that mortgaged property to wit Plot 444 Block 262 was advertised on 20.10.98’

Treat this matter with all the seriousness it deserves.

By the copy of this letter Mr. Sulaiman is informed accordingly...'

22. This is a demand notice. The appellant cannot claim that he never received a demand notice to pay the overdraft. From the evidence, it is the receipt of this letter that prompted him to request for a meeting with the respondent company officials that was held on 24th February 1999.
23. I am satisfied that the appellant was entitled to receive a notice of demand, notifying him of the default of the borrower, to pay the outstanding sums of money under the mortgage deed and the relevant law. The only notice that was dispensed with under clause 5 of the mortgage deed was notice to the borrower, and not to the mortgagor. However, I agree with the learned trial judge that the appellant received the requisite notice. Therefore grounds no.1, 2 & 3 fail.

Grounds 4 & 5

24. Grounds 4 and 5 can be conveniently considered together. It is contended that the learned trial judge erred in law and fact in finding that the suit property was validly sold. And that learned trial judge misdirected herself in relying on unsubstantiated evidence to hold that the property was advertised and valued before sale.
25. It must be pointed out that at the trial neither of the matters raised in the above grounds were in issue. Neither had they been canvassed in the pleadings. The only averment in the plaint that is remotely connected thereto is paragraph 7. It states,

‘The plaintiff shall contend further that after accepting his proposals for repayment and receiving Ushs. 8m/= by the date of sale the defendant’s purported sale was either premature or ineffectual or illegal.’

26. The learned trial judge found that the respondent had not accepted the appellant’s proposal to liquidate the outstanding amount. The contention in paragraph 7 therefore remained unproven. There are no other facts upon

which it was alleged that the sale was premature, ineffectual or illegal other than those set out in this paragraph which were found unproven.

27. I agree with the learned trial judge that the appellant did not prove that the respondent had accepted his proposals. In light of the foregoing the appellant cannot set out a new case on appeal as contended in grounds 4 and 5. I would dismiss grounds 4 and 5 for being incompetent.

Ground 6

28. It is the duty of the appellant to prove bad faith and fraud on the part of the respondent. It is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters. See Kampala Bottlers Ltd v Damanico (U) Ltd (supra).

29. The appellant set out 9 particulars of fraud and or bad faith against the respondent in the plaint. The learned trial judge considered each particular separately in her judgment and found each particular of fraud or bad faith to be unproven. I have examined the evidence on the record both for the appellant and the respondent. I cannot fault the learned trial judge for the conclusion that none of the particulars were proven. The appellant failed to prove the allegations of fraud and bad faith that he set out in the plaint. Ground 6 is without merit.

30. I would dismiss this appeal with costs.

Dated, signed and delivered at Kampala this 17th day of Jan. 2018.



Fredrick Egonda-Ntende
Justice of Appeal

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LUYIMBAZI SULAIMAN } APPELLANT

VERSUS

10 UGANDA COMMERCIAL BANK } RESPONDENT

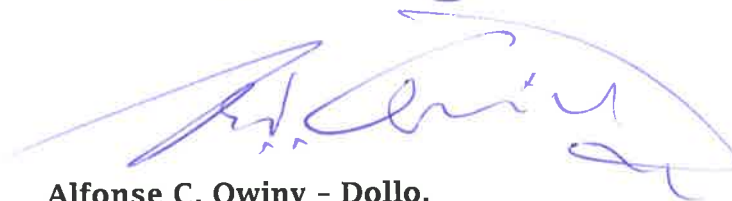
CORAM:

Alfonse C. Owiny - Dollo, D.C.J.; Egonda-Ntende & Obura, JJ.A.

15 **JUDGMENT OF HON JUSTICE A. C. OWINY - DOLLO, D.C.J.**

I have had the benefit of reading, in draft, the judgment of my brother Egonda-Ntende J.A., in the matter herein. I agree with him that this appeal is without merit; and must be dismissed with costs. Since Obura J.A., also agrees, orders are accordingly made in the terms set out by
20 Egonda-Ntende J.A. in his judgment.

Dated at Kampala; this 17th day of January 2019



Alfonse C. Owiny - Dollo,
DEPUTY CHIEF JUSTICE

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JUDGMENT OF HELLEN OBURA, JA

I have read in draft the judgment prepared by my brother Egonda-Ntende, JA and I concur with his conclusion that all the grounds of this appeal lack merit and the appeal should be dismissed with costs.

Dated at Kampala this...17th day of...January, 2018.



Hellen Obura

JUSTICE OF APPEAL