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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

HCT-04-CV-CS-003-2002

CUTHBERT OMURON .....PLAINTIFF

VERSUS

1. UGANDA NATIONAL FARMERS ASSOCIATION
2. THE CO-OPERATIVE BANK LTD. (IN LIQUIDATION) .....RESPONDENTS

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI

RULING

The plaintiff sued the two defendants for a declaration that he was not indebted to either or both of them, and for a declaration that the claim of the 1st or 2nd defendant on his property comprised in plot 3893 block 244 Kisugu and plots 86 – 73 Namabasa, Nakaloke, Mbale was unlawful. He sought a permanent injunction to restrain both defendants jointly and severally from dealing with his property described above. He also prayed for costs of the suit.

The brief facts from which the suit arose were as follows. The 1st defendant (hereinafter referred to as 'UNFA') sought to empower the farmers under their organisation by providing them with farming inputs and other assistance to increase their output. They entered into a memorandum of understanding with the 2nd defendant (hereinafter referred to as the 'bank'),

whereby UNFA would introduce to the bank, persons described as Business Agents. These would, subject to their being accepted by the bank, access loans from the bank, upon providing their own collateral, which would be acceptable to the bank. UNFA would also partly guarantee the loans. The Business Agents would disburse the money obtained from the bank or utilities or farm implements to the farmers, who were members of UNFA.

It was clearly stated in the memorandum of understanding between UNFA and the bank that the so called Business Agents were not agents of the bank. It also came out clearly from that memorandum that the dealings between the Business Agents and the bank would be on the usual bank/client relationship, including offer of acceptable collateral, charging of interest and entering into a mortgage agreement with the bank.

The plaintiff applied for the loan, which was offered. An agreement between himself and the bank was entered into. It was not denied by either party. In order to secure the loan advanced to him by the bank, the plaintiff offered collateral by way of the properties herein mentioned. The plaintiff and the bank entered into legal mortgages, which were duly registered.

The bank duly disbursed into plaintiff's account in the bank's Soroti branch Shs. 75 million. Later, the plaintiff reduced his indebtedness to the bank by depositing shs. 23 million, leaving a balance of about shs 36 million. The plaintiff defaulted in repayment of the remaining secured sum of 36 million. UNFA paid off its guarantee to the bank and was discharged from all obligations arising from this transaction.

I may point out at this stage that the plaintiff stated in his plaint that the failure to repay the loan was partly due to the 'el nino' rains phenomenon which devastated the farmers agricultural produce.

The bank sought to recover the balance owing from the plaintiff by the sale through public auction of mortgaged property. Hence this suit by the plaintiff against UNFA and the bank.

When the matter came up for hearing, Mr Adriko learned Counsel for the bank raised a preliminary point of law for determination. He submitted that the plaint did not disclose a cause of action against the bank, and so the 2nd defendant bank ought to be struck off from the plaint.

The argument was that the plaintiff entered into a legal mortgage with the bank, to secure a loan. The mortgage was duly registered. There was no allegation of fraud in the registration. The plaintiff defaulted in the repayment of the sum secured. All these facts were not denied by the plaintiff. The bank therefore was in order to exercise its statutory right to sell mortgaged property in accordance with the law. There was no fraud or illegality alleged, and so under the Registration of Titles Act, the right of the bank to sell could not be impeached.

In reply Mr. Natsomi learned Counsel for the plaintiff submitted that the matter ought to go to full trial, as there was an important point of law to determine. It was argued that court was being asked to decide whether a mortgagee could exercise his statutory right to sell mortgaged property where he was proxy to an arrangement which had been frustrated by natural

calamity. The case of *Katikiro of Buganda v. A.G. of Uganda* [1958] EA 765 was cited in support.

The issue for court's determination is whether there was a cause of action disclosed by the plaint in respect of the bank.

The Court of Appeal in *Auto Garage & Others v. Motokov* (No. 3) [1971] EA 514, at page 519 D, Spry V.P. stated that, 'if a plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then, a cause of action has been disclosed….'.

The Mortgage Act Cap. 229 in S. 1 (b) defines a mortgage as

> 'any mortgage, charge, debenture loan agreement or other encumbrance, whether legal or equitable which constitutes a charge over an estate or interest in land in Uganda or partly in Uganda and partly elsewhere and which is registered in Uganda.'

The Registration of Titles Act in Ss. 115 and 116 provide in effect that a proprietor of land under the Act may mortgage the land, and when such mortgage is registered, it operates as security.

Section 10 of the Mortgage Act provides that where the mortgage gives express power to the mortgagee to sell without recourse to court, such a sale should be by public auction.

The above provision came under review in *Barclays Bank (U) Ltd. v.Livingstone Katende Luutu* SC C.A. No. 22 of 1992 where it was held that

the bank did not require leave of court realise their security as this had been the undertaking of the mortgagor with the bank. This was in conformity with S. 10 of the Mortgage Act.

The mortgage deed signed between the plaintiff and the bank was annexed to the written statement of defence. It expressly gave the bank powers to sell without recourse to court in case of default. There was no denial that the plaintiff executed the mortgage deed. It is clear from the pleadings that there was default in the repayment of the sum secured. The only argument was that the farmers failed or, and refused to pay up to the plaintiff, due to mistakes committed by the UNFA and also due to the 'el nino' phenomenon. It was not stated anywhere that the bank had anything to do with either of these matters.

It was argued that on the basis of the *Katikiro of Buganda* case (supra), where it was held that the plaint should not be rejected where there was an a serious and important point of law to be determined. But the plaint had in the first place to disclose a cause of action against the defendant, before the court would consider whether or not serious and important point of law existed to justify the suit proceeding to full trial.

In the present case the important point of law which was said to exist was that the mortgagee ought not to be allowed to exercise his statutory right of sale where he was proxy to a programme which was frustrated by natural calamity. The bank and the plaintiff entered into a contractual arrangement where it was agreed that the bank advance money to the plaintiff on the strength of agreed collateral. The parties agreed upon the repayment and

interest chargeable and other terms. A mortgage deed was executed. This was registered. The mortgage deed provided for sale of mortgaged property in case of default of repayment, without recourse to court. There was no mention of any third party in the contract documents. There was no mention of alternative course of action in case of intervening circumstances like natural calamity. Default occurred, and the bank advertised the sale of the mortgaged property by public auction as required by the law.

I did not see that there an important point of law to be determined between the plaintiff and bank. In those circumstances, I did not see that the plaint showed that the 2nd defendant was liable for the violation of the plaintiff's right. This was simply execution of the contract freely entered into by the plaintiff and the bank. Whether the plaintiff has any recourse to the 1st defendant remains to be seen.

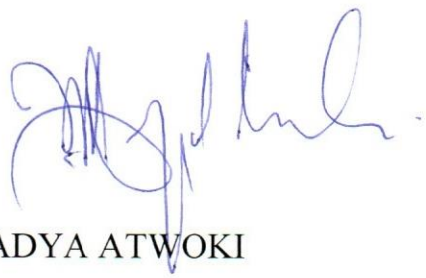
Order 7 r.11(a) of the Civil Procedure Rules provides that a plaint shall be rejected if it does not disclose a cause of action. I did not see that the plaint in this case disclosed any cause of action against the 2nd defendant, the bank. In the premises, the preliminary point of law is allowed. The 2nd defendant is hereby struck off from the plaint. The 2nd defendant shall have his costs.

RUGADYA ATWOKI

JUDGE

19/03/2009.

Court: The Registrar of the court shall deliver this ruling to the parties.



RUGADYA ATWOKI

JUDGE

19/03/2009.