

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
[EXECUTIONS & BAILIFFS DIVISION]  
MISC. APPLICATION NO. 2951 OF 2018  
[ARISING FROM EMA NO. 97 OF 2018 & HCCS NO. 465 OF 2016]

GANAFA PETER KISAWUZI

APPLICANT

V

DFCU BANK LTD

RESPONDENT

BEFORE: HON. LADY JUSTICE P. BASAZA - WASSWA

RULING

Representation:

Mr. Katarwa Herbert for the Applicant.

Mr. Mulongo Peter and Mr. Nyegenye Henry for the Respondent.

Background:

[1] This Ruling is in respect of an application that was filed by Mr. Ganafa Kisawuzi against DFCU Bank Ltd ('the Bank') under **sections 34 of the Civil Procedure Act<sup>1</sup>, and Order 52 Rules 1, 2 & 3 of the Civil Procedure Rules<sup>2</sup>.**

Mr. Kisawuzi seeks for a declaration that the execution proceedings against him vide EMA No. 97 of 2018, are illegal and for costs.

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<sup>1</sup> Cap 71

<sup>2</sup> S.I 71 - 1

- [2] The execution proceedings vide EMA No. 97 of 2018 were brought by the Judgment –creditor; DFCU Bank Ltd (hereafter referred to as ‘the Bank’) to enforce an order for taxed costs of **UGX. 13,324,600/=** that were awarded to it in the main suit; HCCS No. 465 of 2014, in the High Court (Commercial Division).
- [3] Mr. Kisawuzi had unsuccessfully sued the Bank in the main suit by which he had sought for *inter alia*, a Declaration that he is not liable for the loan sums and interest accrued that the Bank advanced to the two (2) borrowers without his knowledge and consent.

The borrowers namely; Mr. Lujuzza Joseph and Mr. Kiwanuka Ponny, had secured repayment of the loan sums using *inter alia*; property comprised in **LRV 3808 Folio 20 Plot 665 Kyadondo Block 187 at Kasangati**, (the ‘mortgaged property’), belonging to Mr. Kisawuzi.

Mr. Kisawuzi’s case:

- [4] The gist of Mr. Kisawuzi’s case as contained in his motion and supporting affidavits is that;
- a) The mortgaged property was sold on May 30, 2016 at **UGX. 160,000,000/=**.
  - b) The money realized from the sale of his property was far in excess of **UGX. 132,102,713/=**, which was the loan sum due at the time of sale.

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- c) The execution is illegal and unlawful.
- d) The Bank should have followed the law on mortgages and apply the proceeds in the order of priority.

The Bank's case:

[5] The Bank answered in its affidavits in reply that;

- a) After the Judgment dated December 7, 2015 the outstanding amount was **UGX. 229,096,708/=** and Mr. Kisawuzi was advised of the amount by a letter dated May 18, 2016.
- b) The property was sold after the Judgment at **UGX. 160,000,000/=**.
- c) None of the items in the Bank's Bill of Costs allowed at **UGX. 13,324,600/=**, relate to or are incidental to the sale of the mortgaged property.
- d) The proceeds of sale of **UGX. 160,000,000/=** is less than the principal of **UGX. UGX. 229,096,708/=** owed to the Bank.
- e) That annexure 'S' to Mr. Kisawuzi's additional affidavit shows the outstanding balance at **UGX. 229,096,708/=** as at September 30, 2014, and neither Mr. Kisawuzi nor EMCO Works ever deposited any money.
- f) No law on mortgages was not followed (sic) and the Rules were followed.

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Issues for determination:

[6] Whether to grant the Orders / Declarations sought?

(Issue amended pursuant to Order 15 Rule 5 of the CPR)

Arguments of Counsel:

[7] Mr. Katabalwa argued for Mr. Kisawuzi that;

- a) The costs awarded should have been deducted from the proceeds of sale. The taxation preceded the sale of the suit property.
- b) The execution proceedings contravene sec. 31 (1) (c) of the Mortgage Act, 2009. The Bank should have followed the laid down procedure in that section.
- c) The costs in the main suit came up as a consequence of the sale of the mortgaged property. All costs incurred in the process of sale of the mortgaged property should have been given priority in accordance with sec. 31 (1) (c) of the Mortgage Act.
- c) As shown in 'S' to Mr. Kisawuzi's affidavit and 'D9' to the Bank's affidavit, on September 30, 2014 the amount of **UGX. 96,993,995/=** was deposited into the account as a credit leaving a balance of **UGX. 132,102,713/=**, which the account shows, was settled from the proceeds of the sale of the mortgaged property.

*M. Katabalwa* 18/12

- d) Mr. Kisawuzi is not personally liable for any costs outside the process of sale. Reference was made to line 6 of the last paragraph at page 25 of the Judgment in the main suit.

[8] In his submissions in reply, Mr. Nyegenye, learned Counsel for the Bank submitted that

- a) The execution was lawful.
- b) The Costs in the main suit are not incidental to the sale of the Mortgaged property. The costs referred to in Sec. 31 of the Mortgaged Act relate to costs incidental to the Mortgagee realizing and selling the Mortgaged property and the main suit vide HCCS No. 465 of 2014 was not related to the sale.
- c) After the sale of the Mortgaged property there was no balance of UGX. 27,884,087/=. EMCO Works is still indebted to the Bank in the sum of UGX. 27,884,087/=. Even if there was a balance, that balance is not money belonging to Mr. Kisawuzi but rather to EMCO Works, which was not party to the main suit.
- d) The Bank agrees that Mr. Kisawuzi was not liable on the loan but is liable to pay the costs of the suit.

[9] In rejoinder, Mr. Katabarwa argued that the main suit (465 /2014) was filed as a result of the advert in an attempt to sale Mr. Kisawuzi's (the mortgaged)

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property. Costs arising therefrom are connected to the sale. The balance of UGX. 27,884,087/= on the loan account statement is a positive not a negative.

Analysis:

- [10] It is not in dispute that the mortgaged property was sold at **UGX. 160,000,000/=** on May 30, 2016. The controversy between the parties centers around two questions;
- 'What was the outstanding loan amount due from the borrowers to the Bank at the time of sale of the mortgaged property?'
- 'Whether the proceeds of sale of the mortgaged property were sufficient to cover the loan outstanding amount?'
- [11] On the one hand, Mr. Kisawuzi's case is that the outstanding loan amount due to the Bank from the borrowers, at the time of sale on May 30, 2016, was **UGX. 132,102,713/=**, while on the other hand, the Bank's case is that the outstanding loan at that time, was **UGX. 229,096,708/=**.
- [12] Mr. Kisawuzi further contends that the proceeds of sale of the mortgaged property were *sufficient* to cover the outstanding loan amount and the costs. That in any case, the costs in HCCS No. 465 of 2014 should have been covered first, in the order of priority laid down in **sec. 31 (1) (c) of the Mortgage Act, 2009**. In rebuttal, the Bank contends that the proceeds of sale of the mortgaged property were *insufficient* to cover the outstanding loan amount and that the costs in HCCS No. 465 of 2014 are outside the costs envisaged under **sec. 31 (1) (c) of the Mortgage Act**.

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[13] I carefully studied the loan statements of account in the name; EMCO Works, which statements were furnished to this court by both Mr. Kisawuzi and the Bank. Refer to annexures 'S' and 'D9' to the additional affidavit of Mr. Kisawuzi and to the additional affidavit of Mr. Bakayana respectively. I found that both statements, supplied by each party say the very same thing.

[14] Both statements 'S' and 'D9' show that on September 30, 2014, a period of over two (2) years prior to the sale of the mortgaged property, the said loan account was credited with a deposit of **UGX. 96,993,995/=**, which payment brought down the loan balance due to the Bank, from **UGX. 229,096,708/=** to **UGX. 132,102,713/=**.

I accordingly agree with the arguments by Mr. Katarwa, that; by the time of the sale of the mortgaged property on May 30, 2016, the outstanding loan balance due to the Bank was **UGX. 132,102,713/=** and not **UGX. 229,096,708/=** as erroneously argued by Mr. Nyegenye.

[15] In view that the sale of the mortgaged property undisputedly realized **UGX. 160,000,000/=**, it follows that, that amount adequately covered the outstanding loan monies. The said two Bank statements clearly bear that out.

I further agree with Mr. Katarwa that the credit payments of **UGX. 119,000,000/=**, **UGX. 990,650/=** and **UGX. 12,112,063/=** reflected on the EMCO Works Bank account that were made on December 7, 2016 and on February 6, 2017, with a narrative reading 'Cr. Loan A/C for recovery', were

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credit payments that totalled to UGX. 132,102,713/=, which discharged the loan due to the Bank.

[16] I will now turn to determine whether the costs in HCCS No. 465 of 2014 are costs within the meaning of sec. 31 (1) (c) of the Mortgage Act, 2009, and should have been paid first in the order of priority laid down in that section.

[17] Section 31 (1) (c) of the Mortgage Act provides that;

The purchase money received by a mortgagee who has exercised his or her power of sale shall be applied in the following order of priority-

- (a) ...
- (b) ...
- (c) In payment of all costs and reasonable expenses properly incurred and incidental to the sale or any attempted sale;
- (d) In discharge of the sum advanced under the mortgage or so much of it as remains outstanding, interest, costs and all other monies due under the mortgage,....'

[18] To determine whether the costs in HCCS No. 465 of 2014 fall within the meaning of sec. 31 (1) (c) of the Act, one has got to look at the purpose for which that suit was filed.

On the one hand, learned Counsel; Mr. Katarwa argues that HCCS No. 465 of 2014 was filed as a result of the advert which was an attempt to sale the mortgaged property and that therefore the costs are connected with the sale.

On the other hand, learned Counsel; Mr. Nyegenye argues that the costs in HCCS No. 465 of 2014 are not related to, nor are they incidental to the sale of the mortgaged property. He argued that the costs envisaged in sec. 31 relate

*Musa Muhwani 18/12*



to costs incidental to the mortgagee realizing and selling off the mortgaged property.

[19] I have perused the plaint and the Judgment in HCCS No. 465 of 2014 and from those documents, it is apparent that, that suit was an effort, albeit an unsuccessful effort, by Mr. Kisawuzi to save his property (the mortgaged property) from being sold by the Bank in exercise of its right as mortgagee. Mr. Kisawuzi sought for orders and declarations that the advertisement by the Bank of the mortgaged property, allegedly without giving him notice, was illegal and for an order that the mortgaged property be released.

[20] In my view, **unmistakably, the costs incurred by the Bank in defending HCCS No. 465 of 2014, are the costs the Bank was awarded in that suit. They were the costs and expenses properly incurred and incidental to or related to the sale of the mortgaged property within the meaning of sec. 31 (1) (c) of the Act.**

[21] Pursuant to sec. 31 (1) (c) & (d) of the Act, the costs in HCCS No. 465 of 2014 should have been discharged first before applying the proceeds of sale of the mortgaged property to discharge the unpaid loan sums, interest and costs under the mortgage. Since that was not done, the Bank contravened that law.

**Clearly the proceeds of sale of the mortgaged property were sufficient to cover not only the costs in HCCS No. 465 of 2014, but also the outstanding loan sums due to the Bank.**

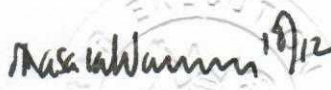
*Nasir Ahmad* 18/12

[22] Considering that the question; '*whether Mr. Kisawuzi is entitled to any residue from the sale of the mortgaged property*', was not put before me nor contested, I will not delve into that question.

Decision and Orders of this Court:

[23] For the reasons given,

1. I allow this application.
2. I declare that the execution proceedings; vide EMA No. 97 of 2018, against the Applicant; Mr. Kisawuzi for the costs in HCCS No. 465 of 2014, are illegal.
3. The said illegal execution proceedings are accordingly struck off the record of Court.
4. The costs of this application shall be paid by the Respondent; DFCU Bank Ltd to the Applicant.

  
**P. BASAZA - WASSWA**  
**JUDGE**

December 18, 2019

Ruling delivered on December 18, 2019 at 12:40 pm in the presence of;

1. The Applicant: Mr. Ganafa Peter Kisawuzi
2. For the Respondent: Mr. Mulongo Peter.
3. Court Clerk: Ms. Nasasi Esther.