THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC. APPLICATION NO. 283 OF 2002

(ARISING FROM HCCS NO. 239 OF 2002)

SAVERS INTERNATIONAL (U) LTD :::::::::::::: APPLICANT/PLAINTIFF

-VERSUS-

1. DFCU BANK LTD
2. DFCU LEASING :::::::::::::::: RESPONDENT/DEFENDANT

BEFORE: THE HON. MR. JUSTICE R.O. OKUMU WENGI

RULING:

This suit was filed by a customer against a bank and its associated leasing enterprise. The facts of the case which are not in depute are that in the year 2000 the plaintiff obtained a loan of shs 200 million from the defendant. The loan was secured by certain properties in Kampala and Mukono, over which the defendant held a legal mortgage. The plaintiff then defaulted on the loans. In an effort to repay, the plaintiff attempted to sell the assets subject of the mortgage without success. He then surrendered three motor vehicles to the defendant for sale. The plaintiff also pledged a credit due to him for certain services or goods or whatever, from the Ministry of Defence. However the defendant who was approached by the plaintiff's friends in government became reluctant and set certain conditions namely that the defence money be paid directly to the defendant. Secondly, that in the meantime executive intervention should be directed at availing the DFCU group tax credits from the Revenue. It seems that these conditions were difficult to realize and the

defence money was not being released. As a result the plaintiff's indebtedness to the defendants were still uncompromised and were due and outstanding in spite of a sale of one of his Rubaga assets.

It is on the basis of the above facts and the serious attempts by the plaintiff and the political leaders to appease the banks, that this suit was brought as the financial institutions still pressed to recover the debt. In the plaint the plaintiff avers that the action of the bank in spite of these extra judicial interventions had caused him to suffer great loss in asset value. He also contends that the defendant owed the plaintiff a fiduciary duty to accept the plaintiff's proposals and relent on its recovery actions. The plaintiff further contends that rejection of reprieve in these circumstances amounted to a breach if fiduciary duty to allow a rescheduling of the plaintiffs debt. The language in the plaint sounded like a human rights or a civil and political rights petition.

I did intervene at the height of the plaintiff's desperation by way of an intern order to stay the bank's pressure. This order lapsed on 28/5/2002. I declined to give a temporary injunction basically because this court was able to deal with the issues raised by the pleadings namely whether the plaint disclosed a cause of action. Secondly I am aware that court injunctions are not a proper remedy in such cases where the Bank is unwilling, perhaps for good reason, to accept to delay recovering a non performing loan portfolio. The law is clear on the courts powers in such cases. A court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage. If an interlocutory order is made it should be so made on the usual undertaking as to damages and on further conditions. See Bharmal Kanji Shah & Anor vs

Shah Depar Deuji (1965) EA 91. In the more recent Kenya Court of Appeal decision, cited to me by counsel for the defendant, Justice Richard Kwach (Tunoi J.A and Shah J.A consenting) said:-

> *" as I understand the law, a dispute as to the exact amount owed under a mortgage is not a ground upon which a mortgagee who has served a valid statutory notice can be restrained from exercising its statutory power of sale. If any authorities were needed for this elementary proposition one need not look beyond Bharmal. Kanji Shar & Anor vs Shah Depar Denji (1965) EA 91. J.L Lavuna & others vs Civil Servants. Housing Co. Ltd & Anor Civil Application No. NAI 14/95 (unreported) and Halsburys laws of England vol. 32 4th Edition paragraph 725."*

The learned Justice of Appeal then continued:-

> "I summarised the position in my ruling in the Lavuna case in these terms:-
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> > "Notwithstanding the stand taken by Mr. Nagpal, in the ultimate analysis this is a suit brought by chargors to restrain a chargee from exercising its statutory power of sale under the charges executed by them as security for money advanced to them and receipt of which they have unequivocally acknowledged. Default is not denied. Service of statutory notice is admitted. I have always understood the law to be that a Court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage."

The passage in Halsburys Laws referred to by Justice Kwach says:-

> "725 The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into Court. That is the amount which the mortgagee claims to be due to him, unless on the terms of the mortgage the claim is excessive ... the mortgagee will also be restrained if, upon a subsequent encumbrancer offering to pay off the first mortgage the mortgagee denies his title to redeem..."

The above position of the law was applied in Barclays Bank of Uganda Ltd vs Livingistone Katende Luutu CA No.22 of 1993 S.C (unreported). In the present case the amount claimed by the bank is not in dispute. The Plaintiffs proposals for repayment were also not feasible in the immediate future and ever since March 2002 todate no money came from Ministry of Defence to repay the debt and no tax credit was availed to the defendant. In other words there is nothing which can be used to hold down the bank. Further there is no pleading of any breach of trust. What the plaintiff alluded to was a breach of what he called a fiduciary duty. No particulars of a breach of trust on the part of the Bank was pleaded as required by Order 6 rule 2 of the Civil Procedure Rules. In short the plaintiff filed a suit for an injunction to thwart the statutory recovery of a loan by a bank. In such cases an injunction as an equitable relief even taking into account debt equity considerations should not be ordered. No doubt the DFCU is quit unrelenting and traditionally if I may say exhibits a degree of heartlessness when dealing with its partners, borrowers or

tenants, a virtue that may be alien to native business. But the law is on its side in this case and this court cannot hold them down.

Turning to the pleadings themselves I am in agreement with Mr. Karugaba learned counsel for the defendant that the plant discloses no cause of action. A sale by a mortgagee gives no cause of action at all where the debt is admitted in full and no payment has been made. In the absence of further agreement to reschedule the debt there is no right of redemption or equity of redemption as repayment is a statutory precondition. The question of an alleged breach of fiduciary duty is quite strange as it is akin to actions arising in professional negligence. A banker's duty to a customer arises out of contract which contract in this case is the mortgage itself. Further still the sale of mortgaged securities by a mortgagee is not only perfectly legal but is the remedy of a mortgagee who has not been repaid. Where a mortgagor expects a large payment from the Ministry of Defence or any other confirmed creditor it is up to the mortgagee to accept an arrangement where that debt can be assigned to it. The fact alone even if it is confirmed by letters originating in the Presidents office as has been claimed in this case such public debt owed to a mortgagor or the letters offer no security or stay of sale of the mortgaged properties. They are not money nor are they security or legel documents that alter the mortgage contract.

I have read the plaint and I am unable to understand if it is a pleading drawn by a genuine advocate of this Court. It could only be the working of degenerate legal practice that ignores the legal basis of claims altogether and proceeds on administrative muscle. No legal right of redemption or even an equitable one as we know it in law has arisen in this case. I am unable to see any duty or right that is breached in this case

and which breach can support this plaint which is filed in a clear abuse of the legal and executive process. In any event if the plaintiff is entitled to a large payment out of the defence budget he should be happy that when this ordeal with his bank debt is over he will have a handsome lump sum all to himself. If it had come early enough he would not even be here in this humble forum. In the result I would strike out this suit under order 7 rule 11(a) and (e) of the Civil Procedure Rules with costs to the defendants.

R.O. OKUMU WENGI

JUDGE

5/6/2002.