

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-OS-0005-2005

KAJOBA GEORGE WILLIAM
SEBAGALA FRED
KAJOBA PATRICK
NDAKA ENOCK FOR AND ON BEHALF OF
ENOS BAGENDA FOUNDATION PLAINTIFF

VERSUS

STEPHEN KISITU
EVELYN KISITU DEFENDANTS

BEFORE: HON JUSTICE LAMECK N. MUKASA

JUDGMENT:

The plaintiffs were by a Representative Order in Miscellaneous Application No. 12 of 2005 issued on 19th April 2005 appointed to represent all members of Enos Bagenda Foundation, a voluntary, non-profit making association with forty-nine members. The plaintiffs claimed to have interest as mortgagees of the land comprised in Freehold Registrar Volume 326, Folio, Kyadondo Block 269 Plot 158 Lubowa Estate, and file his application against Stephen Kisitu and Evelyn Kisitu. By way of originating summons under Order 34 rules 3A and 7 of the Civil Procedure Rules for determination of the following questions:-

1. That the Defendants (mortgagors) pay all the money due and owing to the plaintiffs (mortgagees) under the mortgage.
2. That an account be taken of what is due to the plaintiffs from the defendants under and by virtue of the said mortgage as principal sum, interest and costs thereon.
3. That a declaration be made that the plaintiffs/mortgagees are entitled to a charge on the mortgaged property/land and order be made empowering the mortgagees or their agents to have a right of access to the mortgaged land.
4. That failure to pay the sum due and owing, pursuant to the mortgage within 14 days from the date of service hereof on the Defendants, the said mortgage be enforced by the sale of the mortgaged property and an order be made setting down the terms for such sale.
5. That the plaintiffs be awarded costs of this suit.
6. That the plaintiffs be granted any further and other relief as this Honourable Court may deem fit.

Order 34 rule 3A CPRs provides:

“Any mortgagee a mortgagor whether legal or equitable, or any person entitled to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out of course an originating summons, returnable before a judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require, that is to say, sale, foreclose, delivery of possession by the mortgagor, redemption, reconveyance or delivery of possession by the mortgagee”

The Originating Summons were by Order of Court served on the Defendants by way of substituted service. The Defendants did not file any affidavit in reply or attend the hearing. Therefore hearing proceeded *ex parte*.

The application is supported by an affidavit sworn by Kajoba George William the chairman of Enos Bagenda Foundation. The affidavit and annexures thereto give the background to this cause. By letter annexure F the said Kajoba George Bagenda in response to the Defendants

loan, inquiries informed the Defendants, who are also members of the association, that the association was in a position to lend the Defendants money free of interest for 3 months on condition that they repay the entire sum in one lump sum at the end of the 3 months, failure of which the amount advanced shall attract interest at 5% per month. By their letter dated 8th September 2004 (Annexure C) addressed to the association the Defendants requested for a loan of Ughs.20,000,000/= to be granted against the Defendants Certificate Title in respect of land comprised in Free hold Register Volume 326, folio 1 area 0.202 Hectares Kyadondo Block 269 Plot 158 Lubowa Estate as security. In the letter the Defendants agreed on the terms and conditions of repayment of the association and undertook to pay the loan in three months from the date of receiving the whole amount. They appointed William Kajoba the chairman in and deponent to the affidavit in support, to receive the money from the association on their behalf.

In paragraph 4 of the affidavit Kajoba George William states that upon the defendants instructions, he passed the said sum of Shs20,000,000/= to the Defendants agent one Alice Kirunda. Annexure E shows that Shs.5,000,000 was paid out on 14th September 2004, Shs.10,000,000/= on 22nd September 2004 and Shs.5,000,000/= on 13th October 2004 and receipt acknowledged by one Alice Kirunda. The total advance was Shs.20,000,000/=.

In paragraph 3 of the affidavit the deponent avers that the Defendant deposited the little deed to the above described property as security. In paragraph 6 the avers that no mortgage deed was executed in respect of he said mortgage but that the defendants deposited their title deed with the deponent in his capacity as chairman of the association as security for repayment of the loan. Photocopy of the Certificate of Title was annexed as annexure "D". The evidence outlined above shows that M/S Enos Bagenda Foundation is an equitable mortgagee in respect of the Certificate Title to the above described land.

In paragraphs 5,7and 9 the chairman avers that the loan was to be paid at the end of the third month interest free, but if unpaid thereafter, it was to attract interest of 5% per month if the sum remained unpaid. That the defendants have since defaulted in payment of the principle sum plus interest and finally that the amounts due are:

- (a) Amount of advance Shs.20,000,000/=
- (b) Monthly interest of 5% (per month for four months) Shs.4,000,000/=

To make the total claim of Shs24,000,000/=. Annexure “C” to the affidavit show that the terms and conditions of repayment were accepted by the Defendants.

Annexure E shows that the final installment of the loaned money was paid to Alice Kirunda on 13th October, 2004. According to the Defendants letter, annexure “C,” the loan was to be repayable in three months from the date of receiving the whole amount and according to annexure F for the first three months the loan was interest free. Therefore the 5% monthly interest starting accruing after 13th January 2005 and only on the principle sum. Therefore monthly, effective from 13th January 2005 the principle sum of Shs20,000,000/= is earning the plaintiff’s an interest in the sum of Shs.1,000,000/=. By the hearing of this application on 19th September, 2005 the principle sum had earned interest in the total sum of Shs.7,000,00/=. In paragraph 10 of the affidavit the chairman avers that the plaintiffs have not received any money or anything of value as regards the realization of the said sum. In absence of any evidence to the contrary I find that defendants still owe money to the plaintiff on the loan advanced in the following sums:-

- 1. Principal sum Shs20,000,000/=
- 2. Monthly interest of 5% for 7 months Shs.7,000,000/=

Making a total of Shs.27,000,000/= due and owing from the Defendants to the Plaintiff.

In the circumstances I find that the plaintiff are entitled to the orders below:-

- 1. The defendants pay all the money due and owing from the plaintiff under the mortgage in the sum of Shs.27,000,000/=:, plus the taxed costs occasioned by this application.
- 2. The plaintiffs as mortgagees are entitled to a charge on the mortgagee property situate and known as Freehold Register Volume 326 folio 1 Kyadondo Block 269 Plot 158 Lubowa Estate and the mortgages or their agents are hereby granted a right of access to the mortgaged land.

3. In the event of failure to pay the sum due and owing, pursuant to the said equitable mortgage and the costs of this application within 21 days from the date of service of this order on the Defendants, the said mortgage be enforced by sale of the mortgaged property upon the following terms:-

- (i) The sale shall be by private treaty
- (ii) The proceeds from the sale shall be used as follows:-
 - (a) Pay the costs and charges, if any, involved in the sale.
 - (b) Pay the sum due and owing pursuant to the mortgage plus the costs of this application.
 - (c) Any balance to be passed over to the Defendants

I so order.

Hon. Lameck N. Mukasa

Judge

30th September, 2005