

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - OS - 0012 - 2006

COMMERCIAL MICROFINANCE LTD :::::::::::::::::::: PLAINTIFF/MORTGAGEE

VERSUS

DAVIS EDGAR KAYONDO :::::::::::::::::::: DEFENDANT/MORTGAGOR

BEFORE: THE HON. MR. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The Plaintiff/Mortgagee brought this case by way of originating summons to foreclose the defendant/mortgagor's right to redeem his mortgaged property. The brief facts are that the defendant obtained a loan from the plaintiff of Shs.7,000,000/= by an agreement dated 6th June 2005. The loan was secured by a personal guarantee of the borrower, the personal guarantees of two other persons and a piece of unregistered land with a residential house situated at Kireka Zone B. The defendant further executed a power of attorney in favour of the plaintiff with inter alia a power to sell and dispose of the said land.

As at the 30th day of January 2006 the loan stood at Shs.4,645,052/= which the plaintiff demanded payment for but the defendant defaulted.

According to the affidavit of service of one Bernard Kakande, a process server, the summons were served on the defendant in person on the 7th day of March 2006. The defendant however did not defend the originating summons. The case then proceeded ex parte. Mr. A. Mugenyi appeared for the plaintiff.

Mr. Mugenyi addressed court on two issues namely;

- 1- Whether the defendant may take unregistered land as security.
- 2- Whether foreclosure applies to unregistered land.

Issues No.1: Whether the defendant may take unregistered land as security

Mr. Mugenyi referred me to S.2 of the Microfinance Deposit Taking Institutions Act, under which the plaintiff is licensed, as authority for the plaintiff to take security to secure its lending. He said that the section refers to the taking of collateral substitutes and submits that unregistered land is one such collateral. Section 2 actually states that collateral substitutes are "characterized" by "group guarantees or compulsory savings" but does not mention unregistered land. However though this is not really in issue I don't think that the Act prohibits the use of unregistered land and indeed the practice of Microfinance Institutions is to use it as collateral.

The bigger question is whether unregistered land can be the subject of a mortgage.

The starting point is Section 54 of the Registration of Title Act [Cap230] which provides that no instrument until registered shall be effectual to pass any estate or interest in any land under the Act. However, a lot of unregistered land is still pledged in Uganda.

The courts therefore held in

Souza Figueiredo Ltd V Moorings Hotel Co. Ltd [1960] EA 926 (CA) (U)

that an unregistered instrument may operate as a contract, which is enforceable as between the parties. Indeed the learned author Grace Patrick Tumwine–Mukubwa in his book *“Essays in African Banking Law and Practice”* © Uganda Law Watch 1998 at Plaintiff 358 on unregistered land writes

“There are other estates and interests in land which are not registrable under the Registration of Title Act but which are recognized under the law and which can form the subject matter of a mortgage. These are customary tenure and tenancy by occupancy”. The laws Tumwine-Muhubwa refers to are the 1995 constitution [Art 237 (3) (a)] and the Land Act (Cap 227 S.2).

Of course where there is a customary certificate of ownership under Section 8 the Land Act and in particular Section 8 (2) (c) such certificate can be the subject of a mortgage. However where there is no customary certificate of ownership, as in this case, the position is less clear. Learned author John T. Mugambwa in his book *“Principles of Land Law in Uganda”* fountain publishers 2002 at Plaintiff 116 observes

“The Act does not prescribe the procedure for the creation of a mortgage over land owned under customary tenure or right of occupancy”.

However, the case of **Matambulire V Kimera** [1975] H.C.B 150 (CA No. 37 1972) would seem to suggest that since such land would not fall under the Registration of Title Act then the applicable law would be common law and the doctrines of equity. In the case of **Wasswa V Kikungwe** (1952 – 6) 7 ULR 1, interesting it was held that where a contract resembling a mortgage between “natives” is sought to be enforced the courts could apply the English law of equity applicable to mortgages.

Mr. Mugenyi has referred to the land in this case as a Kibanja which is a customary holding and therefore can be used to create a mortgage under the common law and doctrines of equity. This on the authorities cited above I agree with and therefore answer the first issue in the affirmative.

Issue No. 2: Whether foreclosure applies to unregistered land.

Mr. Mugenyii submitted that Section 8 of The Mortgage Act provides

“A mortgagee may apply to court to foreclose the right of a mortgagor to redeem the mortgaged land any time after the breach of the covenant to pay...”

However, S.1 (b) of the same Act 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 under the Act”.*

Unfortunately, the section does not state what 'Act' is referred to in that section. In my view, however, the Mortgage Act is not applicable in this case as the plaintiff's interest in the land was not registered under that or any other Act and in agreement with Ssekandi, Ag. J. (as he then was) in the case of **Matambulire V Kimera, H.C.C.A No. 37 of 1972, at P.8,** in the case of unregistered interests in land the law applicable is the common law and the doctrine of Equity (S.14 (2) (b) (i) of the Judicature Act, (Cap 13).

Equity has always regarded a security interest in land to secure a debt as a mortgage and the right to redeem the land by payment of the debt and interest as an inviolable right of the mortgagor which cannot be taken away by any provision to the contrary in a contract. There must be no clog or fetter on the equity of redemption. This means that, the mortgagor cannot be prevented from eventually redeeming his property on repayment of the sum advanced together with interest due and the mortgagee's proper costs, and secondly that, after redemption he is free from all the conditions of the mortgage. Any express stipulation which is inconsistent with the right of redemption will be ineffective and the mortgagor may still redeem as if there had been no such restriction. [See Megarry & Wade, *The Law of Real Property*, (6th Ed) Para 19 – 129]. The same position was held by Mr. Justice Guthrie Smith in the case of **Erieza Wamala V Musa Musoke, [1920-29] III ULR 120** at Pp 120-121, where he stated that;

"Its an old established rule that if money is lent on the security of land, the lender will get security and nothing more... Therefore if the borrower wishes to redeem the land within a reasonable time he will always be allowed to do so, even though the due date is past. This rule is so strict that not even an express agreement will be allowed to exclude the borrower's right to redeem".

If the lender wishes to do so, his remedy is to sue the borrower and get an order of foreclosure from the court that unless the borrower pays up in full within 6 months his right of redemption is to be barred.

The power of attorney of sale executed by the mortgagor in this case is therefore ineffective if it is used as a clog on the mortgagor's equity of redemption.

According to E.L.G. Tyler in his book, Fisher & Lightwood's Law of Mortgages (10th Ed) at P.426, writes that it is a rule of practice to allow the mortgagor 6 months for payment, the period being reckoned from the contracted date of redemption.

In this case, Mr. Mugenyi has shown that the plaintiff demanded payment of the amount due on the loan on 30th January 2006 and the defendant had defaulted. It is now approximately 13 months from the date the debt became due. It would thus be inequitable to give the defendant another 6 months in which to make the payments before the plaintiff is granted a remedy. It is a principle of equity that *"he who seeks equity must do equity"* (Megarry & Wade, The Law of Real Property, Para 19 – 017.

In this case therefore in exercise of courts discretion, I hereby direct that the defendant's equitable right to redeem will be extinguished at the expiration of 2 months from the date of this judgment if the debt is not repaid in full with interest within that period.

At the expiration of the two months, on default of payment, the plaintiff shall sell the defendant's interest in the mortgaged land by public action after giving the defendant 30 days notice of the date and place of sale.

I award costs to the plaintiff.

Sgd: Geoffrey Kiryabwire

JUDGE

Date: