

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

HCT - 00 - CC - CS - 25- 2006

**In the Matter of Block No. 110 Plot No. 2192 Land at
District of East Buganda**

And

**In the Matter of an equitable mortgage over the said Property
in favour of Nakasero Soap Works**

And

**In the Matter of an Application for foreclosure and the sale of the
mortgage property.**

Between

NAKASERO SOAP WORKS ::::::::::::::: PLAINTIFF/MORTGAGEE

VERSUS

- 1. UGANDA BEST TEA LTD**
- 2. SIIRA AMISI**
- 3. AL HAJI MUSA JAMIL KAMYA ::::::: DEFENDANTS/MORTGAGOR**

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

This is a suit by way of originating summons to answer the questions;

1. Whether the principal debtor having failed inspite of repeated demands to pay to the plaintiff/mortgagee the sums advanced which as of the 31st December 2003 stood at Ug.Shs.5,908,000/= should be foreclosed of his right to redeem the mortgaged property?
2. Whether the plaintiff/mortgagee should be permitted to sell the mortgaged land upon foreclosure in accordance with the law.
3. Whether the plaintiff/mortgagee should be granted costs of the suit.

The plaintiff/mortgagee are manufacturers of soap, sweets and other commodities. The case for the plaintiff is that between 3rd July 2002 and 24th September 2002 the second defendants one Siira Amisi solicited credit from the plaintiff and received goods on behalf of the first defendant M/S Uganda Best Tea Ltd. The said credit is said to have been created way of a pledge of the third defendant Ali Haji Musa Jamil Kamya's certificate of Title for Block No. 110, Plot No. 2129 (hereinafter called the "property") on the 1st July 2002. Ali Haji Musa Jamil Kamya is the father of Siira Amisi. The plaintiffs then lodged a caveat on the said title on the 29th August 2002 under instrument No. MK 066245 and retained the original certificate.

The plaintiffs then supplied goods to the first defendant who failed to fully pay for them leaving an outstanding amount of Ug.Shs. 5,908,000/= as at 31st December 2003. The plaintiffs wish to recover this money through the sale of the said property.

The case for the defendants on the other hand is that if there is a debt owing then it is between the first defendant and the plaintiff but has nothing to do with the second and third defendants. The second and third defendants depone that the credit facility if any was to have been to the second defendant but no such credit was ever extended to him and they have no obligation to pay the alleged debt of Ug.Shs. 5,908,000/= due from the first defendant to the plaintiff.

Mr. R. Obonyo appeared for the plaintiff while Mr. A. Ssewankamba appeared for the defendants.

As to the first question it is first important to determine the nature of the credit in this transaction if at all. This will then resolve all the questions asked of the court. Annexure 'A' to the affidavit of Mr. Edward Isingoma, the Chief Accountant of the plaintiff, is a pledge note that reads

"I, Ali Haji Musa Jamil Kanya of P.O. Box 1005 Kampala, hereby give as security my land title, in original form, of Block No. 110, Plot No. 2192, District of East Buganda to Nakasero Soap Works Ltd. Against the credit they are giving my son Siira Amisi, Managing Director of Uganda Best Tea Limited, P.O. Box 516 IGANGA, for their products (Soap, Sweets and utensils). Nakasero Soap Works is at liberty to lodge a caveat on the title deed they are holding as security.

Signed... *Ali Haji Musa Jamil Kamy* 01/07/02

Signed

Witnessed... *SIIRA AMISI,* 01/07/02

Witnessed by *second defendant* 01/07/02

(no name)

"

Annexure 'A' further has a short letter which reads

"

Nakasero Soap Works Ltd

P. O. Box 218

Kampala

Re: Debt repayment agreement dated 18th April 2006

I SIIRA HAMISI do hereby make a commitment to make a full and final settlement of the debt of Ug.Shs. 5,907,400/= (five million nine hundred seven thousand four hundred shillings only) by 5th July 2006. the repayment instalments shall be 2,000,000/= per month starting with the first installment being recovered by Nakasero Soap Works by 5th May 2006, second installment by 5th June 2006 and last by 5th July 2006.

Failure to repay in or by any of the above dates, deems all the amount cashable and both the security provided earlier plus any of my personal properties eligible for disposal to recover the amounts owed together with all legal costs.

Signed SIIRA HAMISI

Date: 18/04/06

<i>Witnessed by</i>	<i>name</i>	<i>sign</i>	<i>date</i>
1.	<i>Kibirige Mohamed</i>	<i>(signed)</i>	<i>18/04/06</i>
2.	<i>Namuleme Zam</i>	<i>-do-</i>	<i>-do-</i>
3.	<i>Ali Haji Musa Jamil Kamyia</i>	<i>-do-</i>	<i>-do- "</i>

Counsel for the defendant submitted that the transaction had nothing to do with SIIRA HAMISI and his father Ali Haji Musa Jamil Kamyia. That the reference to the first defendant in the pledge note was only a mere address and in any event the first defendant is a corporate body separate from the other defendants. Both the second and third defendants also depone that they have nothing to do with the transaction and credit if any should have been given to the second defendant personally which was not the case.

The submissions of counsel for the defendants are as amazing as is the evidence of the second and third defendants by affidavit. To any third party the two documents of annex 'A' tell the whole story.

The letter dated 14th April 2006 in particular acknowledges the debt owned to the plaintiff of Ug.Shs.5,907,400/= and is signed by the second defendant and witnessed by the third defendant. How now can they turn around and deny the transaction and blame it on the first defendant which is their company. Of course they wish to rely on the doctrine of separation of liability between a company and its members as their defence because counsel for the defendant referred me to the case of

Salomon V Salomon & Co. [1897] AC 22 HL.

With the greatest of respect that is a sham defence and the evidence does not support it. Both the second and third defendants acknowledge of Ug.Shs. 5,907,400/= and therefore gave false evidence by affidavit that they know nothing about it. Annexure 'C' to Mr. Isingoma's affidavit which is a statement of account clearly shows that the Ug.Shs. 5,907,400/= that both the second and third defendants is acknowledged was with respect to money owned by first defendant to the plaintiff. It seems to me that the defendants simply do not wish to pay the debt which is a dishonest business practice and therefore is unacceptable. They should pay for goods they obtained on credit.

Having found as above, does there exist a right to foreclose? The second and third defendants made available the property comprised in Block No. 110, Plot 2192 to plaintiffs by way of security and placed a caveat on it to show their interest. Section 129 of The Mortgage Act (Cap 229) provides that an equitable mortgage is created by deposit by the registered proprietor of his certificate of title with intent to create a security there on whether or not accompanied by a note or memorandum of deposit.

In the instant case this is exactly what the second and third defendants did. The third defendant as proprietor by his actions and writings consented to this. There is therefore no doubt in my mind that an equitable mortgage was created with the plaintiff as mortgagee.

Section 8(1) of The Mortgage Act provides that a mortgagee can apply to court to foreclose the right of the mortgagor to redeem the mortgaged land at any time after breach of covenant to pay. In this case there is default on the payment of Ug.Shs. 5,907,400/= and the covenant to pay it as acknowledged in the letter to annex 'A'. Clearly the right to foreclose has crystallised and I so find. In answer to question number one to the summons, the answer there is yes.

It follows therefore that in answer to question number two, the mortgagee is permitted to sell the mortgaged land now foreclosed in accordance with the law.

Lastly I award the plaintiff the costs of the suit.

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Geoffrey Kiryabwire

JUDGE

Dated: 7/12/2007

07/12/07

10:45am

Judgment read and signed in Court in the presence of;

- Richard Obonyo for plaintiff/mortgagee
- Bukenya Frank – Court Clerk

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Vincent Emmy Mugabo

Asst. Registrar

Date: 7/12/07