

**THE REPUBLIC OF UGANDA**

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

**ORIGINATING SUMMON 27 OF 2003**

**IN THE MATTER OF LEASEHOLD REGISTER VOLUME 149 FOLIO 8  
PLOT 1 RUBAGA ROAD KAMPALA  
AND**

**IN THE MATTER OF AN EQUITABLE MORTGAGE**

**AND**

**IN THE MATTER OF AN APPLICATION FOR FORECLOSURE AND SALE  
OF THE SAID MORTGAGED PROPERTY  
BETWEEN**

**NASSER KIYINGI ::: PLAINTIFF**

**AND**

**FRIENDS ESTATES LTD}  
MALKAN } ::: DEFENDANTS**

**BEFORE: THE HON. MR. AG. JUSTICE GEOFFREY KIRYABWIRE**

**RULING**

The application was brought by way of Originating Summons under (OS) section 8 and 9 of the Mortgage Act (Cap 229) and section 104(1) of the Registration of titles Act (CP 220) and order 34 rule 3A of the Civil Procedure Rules (CPR).

The OS sought the determination of the following questions.

- "1. Whether the first defendant having failed In spite of repeated demands to pay the plaintiff the sum advanced should be foreclosed of its rights to redeem the mortgaged property.*
- 2. Whether the plaintiff should be permitted to sell the mortgaged property upon foreclosure in accordance with the law.*
- 3. Whether the plaintiff should be granted costs of this suit.*
- 4. Whether the 2<sup>nd</sup> defendants caveat be removed from the register."*

I believe as normally the drafting practice questions No. 3 On costs should have been the last and final question i.e question No. 4 Instead.

The application was supported by the affidavit of the plaintiff (The proper titles however should have been Applicant and Respondent not plaintiff and defendant) Mr Nassser Kiyingi.

Based the pleadings and subsequent evidence the facts of the application are that the plaintiff advanced funds to the first defendant against the security of a duplicate certificate of title for plot 1 Rubaga Road in Kampala. The security was by way of deposit of the said title and hence an equitable mortgage. The title however had a Caveat in favour of the second defendant registered on the 25<sup>th</sup> June 1992. The first defendant failed to pay back the monies advanced to him. The plaintiff by this action in court now seeks to foreclose on the property and have the Caveat removed.

The summons were served by way of substituted service in the Monitor Newspaper of the 12<sup>th</sup> December 2003 pursuant to a court ruling vide M.A 695/2003.

The defendants did not file any affidavit or other document in reply to O.S. However Mr. Lwanyaga at the time of hearing on the 17<sup>th</sup> November 2003 of the OS appeared for the first Defendant and requested court to allow the parties time to pursue a settlement. The court in a spirit of reconciliation granted an adjournment to allow for a settlement to be explored. Up to 4 subsequent short adjournments were given. At one stage counsel for the first Defendant told court that the Ismail Community in Uganda led by one Mr A. Karamali (a.k.a Mukwano) had agreed to intervene in this matter with a view to a settlement. All this came to nothing and so court decided to proceed with the hearing. At this stage counsel for the first Defendant totally disappeared.

At the hearing, I decided that the affidavit of the Plaintiff required further clarification as to how the money i.e. Ug. Shs. 147,000,000/= had been advanced and how default/non payment had been occasioned. The Plaintiff was then called in to give evidence by affirmation to clarify on his affidavit. The Plaintiff gave evidence that he is a general businessman who deals in among other things produce plus Hides and Skins. He had dealt with the first Defendant before when they bought maize from him. The Plaintiff further said that the first defendant approached him in 2001 to supply them maize

worth Ug. Shs. 147,000,000/= because the first Defendant had obtained a contract with the World Food Programme (WFP) to supply them with maize. This was a "back to Back" contract where by it was agreed that the first Defendant would pay the Plaintiff when he was paid by WFP. This arrangement would be secured by the deposit with the Plaintiff of the title of document to plot 1 Rubaga Road Kampala.

The Plaintiff further testified that the latest time for payment in any event was March, 2002. As it would appear no formal agreement was executed save the deposit of the title as security.

The Plaintiff then testified that he has not up to now been paid and that the first Defendants have since closed their premises. As a result the Plaintiff has lost money.

Based on the evidence on record and in the absence of any evidence in rebuttal I find that the first Defendant owes the Plaintiff Ug. Shs. 147,000,000/= which to-date he has failed to pay. The first Defendant was represented but chose not to file any affidavit in reply and at the end of the day even its counsel seems to have "abandoned" the case. Clearly I find that the first Defendant had no real desire to defend the application.

As to the second Defendant, no appearance in person or by counsel was made. I accordingly also find no desire by the second Defendant to defend or

otherwise rebut the application. The second Defendant has therefore according the law failed to show cause why the Caveat, old as it is should not be removed.

I therefore determine the questions in the (os) as follows:

On the first question whether the first Defendant be foreclosed of its right to redeem the mortgaged property I answer in the affirmative.

I accordingly rule that the first Defendant is foreclosed of its right to redeem the mortgaged property effective the dated of this ruling.

On the second question on whether one Plaintiff should be permitted to sell the mortgaged property following foreclosure in accordance with the law, I also answer in the affirmative.

I accordingly rule that the Plaintiff may proceed to sell the property now foreclosed but keep a proper account of the method and proceeds of sale.

As to the fourth question as to whether the 2<sup>nd</sup> Defendant's Caveat be removed from the register I also answer in the affirmative.

I accordingly rule that the Registrar of Titles do hereby remove the Caveat on leasehold volume 149 folio 18 plot 1 Rubaga Road Kampala registered on the

25<sup>th</sup> June 1992 under instrument No. 252771 in the names of H.T.A MALKAN  
of P.O. BOX 1385 Kampala.

As to the third and last question on costs, I award costs to the Plaintiff.

Geoffrey Kiryabwire

**Ag. JUDGE.**

Date.....