

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT MAITAMA

BEFORE HIS LORDSHIP: HON. JUSTICE Y. HALILU

COURT CLERKS : JANET O. ODAH & ORS

COURT NUMBER : HIGH COURT NO. 22

CASE NUMBER : SUIT NO: CV/467/2018

DATE: : TUESDAY 26TH JANUARY, 2021

BETWEEN:

1. YUJALLAH HOLDING LIMITED } PLAINTIFFS
**2. YUSUF MOHAMMED BALARABE }
HALADU }**

AND

1. GUARANTY TRUST BANK PLC. } DEFENDANTS
2. FED. CAP. DEV. AUTHORITY (FCDA) }

JUDGMENT

The Plaintiffs vide originating summons approached this Honourable Court for the following reliefs;

- a. A declaration that the 1st Defendant's exercise of the mortgagee's power of sale by which it sold the property which was used as collateral for loans granted by the 1st Defendant to the 1st Plaintiff was null & void.
- b. A declaration that the 1st Defendant was wrong to exercise its mortgagee's power of sale in secrecy or without the knowledge and or notice to the 1st Plaintiff.
- c. A declaration that the 1st Defendant's right of sale of the mortgagee's property was not done in

good faith since the mortgaged property was sold far below its value.

- d. An Order nullifying the 1st Defendant's purported sale of the property to a 3rd party.
- e. An Order of Perpetual Injunction restraining the 2nd Defendant from registering the 1st Defendant's sale of the property to a 3rd party.
- f. The sum of One Hundred Million Naira (N100,000,000.00) jointly and severally for the Plaintiffs being general damages against the 1st Defendant for the wrongful acts.

OR IN THE ALTERNATIVE:

1. An Order directing the 1st Defendant to pay to the Plaintiffs jointly and severally the sum of Two Hundred and Fifty Million Naira

(N250,000,000.00) as damages for sale of the property.

2. An Order directing the 1st Defendant to pay the Plaintiffs jointly and severally 21% interest on judgment sum.
3. An Order directing the 1st Defendant to pay the Plaintiffs jointly and severally post judgment interest of 10% of the judgment sum from the date of judgment to the date the judgment sum is fully paid.
4. The cost of this action.

The Plaintiffs distilled the following questions for determination; to wit;

- i. Whether the 1st Defendant was right to exercise its mortgagee's power of sale over the

2nd Plaintiff's property situate at plot 631 Abeokuta Street, Garki 1, A01, Abuja which was used as collateral for the loans granted the 1st Plaintiff by the 1st Defendant?

- ii. Whether the 1st Defendant was right to exercise its mortgagee's power of sale in secrecy or without the knowledge and or notice to the Plaintiff.
- iii. Whether the 1st Defendant right of sale of the mortgage property was done in good faith in view of the fact that the mortgagee's property was sold far below its value.

In support of the application is an affidavit of 30 paragraphs deposed to by the 2nd Plaintiff himself.

It is the deposition of the Plaintiff as distilled from the affidavit in support that the 1st Plaintiff is a

customer of the 1st Defendant and in that respect holds and operates Account No. 301181570110.

That the 1st Plaintiff via letter dated the 15th December, 2010, applied to the 1st Defendant for a loan facility of One hundred Million Naira (N100,000,000.00) vide Exhibit “A”.

Plaintiffs aver that, it accepted the loan offer and deposited the original certificate of occupancy No. 19d2w-895 cz-5275r cfr2u-10 in respect of plot 631 Abeokuta Street, Garki, A01, Abuja hereinafter called “the property” as collateral for the loan. And both parties agreed that the value of the property was Two Hundred and Fifty Million Naira (N250,000,000.00).

That the parties agreed to use that property as collateral for another loan of Fifty Million Naira

(N50,000,000.00) to a sister company vide Exhibit “C”.

It is the case of the Plaintiff that it wrote the 1st Defendant on the 18th September, 2012 vide Exhibit “D” where in the end it sought for the restructuring of the two loan facilities of One Hundred Million Naira (N1,000,000.00) vide Exhibit “E” and that consequent upon the restructuring, a fresh offer of loan facility was made vide Exhibit “F”.

Plaintiffs aver that on the 28th March, 2013 the 1st Plaintiff paid to the 1st Defendant the sum of Two Million Five Hundred Thousand Naira (N2,500,000.00). And that 1st Defendant sent a letter of demand for the payment of the loan vide Exhibits “G” and “H”.

That Plaintiff instructed the Firm of **Osas&Oseji**, Estate Agents and valuers to sell the property at its open sale value of Three Hundred & Sixty Million Naira (N360,000,000.00) vide Exhibit “I”.

Plaintiffs aver further that it has paid the Defendant the sum of Eleven Million, Five Hundred Thousand Naira (N11,500,000.00). And that on the 22nd May, 2013, the 2nd Plaintiff received a letter that the property was sold for One Hundred and Fifty Five Million Naira (N155,000,000.00) vide Exhibit “J”, and that from the 22nd February, 2013 the loan was restructured and the 22nd May, 2013 when the Plaintiffs received the letter notifying them that the property had been sold, 1st Plaintiff had paid to 1st Defendant the total sum of N16,000,000.00 (Sixteen Million Naira).

In line with procedure, written address was filed wherein the questions formulated in the preceding part of this judgment were raised for determination;

- i. Whether the 1st Defendant was right to exercise its mortgagee's power of sale over the 2nd Plaintiff's property situate at plot 631 Abeokuta Street, Garki 1, A01, Abuja which was used as collateral for the loans granted the 1st Plaintiff by the 1st Defendant?
- ii. Whether the 1st Defendant was right to exercise its mortgagee's power of sale in secrecy or without the knowledge and or notice to the Plaintiff.
- iii. Whether the 1st Defendant right of sale of the mortgage property was done in good faith in

view of the fact that the mortgagee's property was sold far below its value.

Learned counsel for the Plaintiffs argued the issues conjunctively.

Counsel contended that the mortgagee's right of sale should not be exercised in secrecy, and that the equity of redemption is a strong point in equity and cannot lightly be vitiated. ***NIGERIAN ADVERTISING SERVICE LTD VS UBA (2005) 14 NWLR (Pt. 945) page 421 at page 438 paragraph "A – B"***.

Counsel contended that apart from the fact that the 1st Plaintiff was not notified about the sale of the mortgaged property, there was nowhere public auction of the sale of the property was done and or advertised and therefore null and void.

Learned counsel argued that where the court is unable to reverse the sale of the property, damages should be awarded. ***WEMA BANK PLC. VS ABIODUN (2006) 9 NWLR (Pt. 984) page 1 at 40.***

Counsel argued that selling the property the way it did, the 1st Defendant had denied the 1st Plaintiff the equitable right to redeem the property used as collateral. Finally court was urged to grant the reliefs sought.

Upon service, 1st Defendant filed counter affidavit of 7 paragraphs deposed to by one HabilaDanladi, a litigation secretary in the law firm of the 1st Defendant's counsel.

It is the deposition of the 1st Defendant that the loan facility availed to the Plaintiffs was secured by a Tripartite Deed of Legal Mortgage over the

2nd Plaintiff's property situate in Abuja, and that the debt became due and payable following the Plaintiffs several defaults; and that several demands were made vide Exhibit "A1" but that Defendant had no choice but to exercise her right of sale under the Deed of Legal Mortgage which was due and has arisen vide Exhibit "A2".

1st Defendant avers that, the Plaintiff's letter of 8th May, 2013 was received by the Defendant on 24th May, 2013 after the sale of the mortgaged property.

1st Defendant argued that Plaintiff was not entitled to be given Notice of sale as the mortgaged property was sold by private treaty and not public auction.

Learned counsel for the 1st Defendant filed written address wherein he adopted the issues formulated by Plaintiff as issues for determination, to wit;

- i. Whether the 1st Defendant was right to exercise its mortgagee's power of sale over the 2nd Plaintiff's property situate at plot 631 Abeokuta Street, Garki 1, A01, Abuja which was used as collateral for the loans granted the 1st Plaintiff by the 1st Defendant?
- ii. Whether the 1st Defendant was right to exercise its mortgagee's power of sale in secrecy or without the knowledge and or notice to the Plaintiff.
- iii. Whether the 1st Defendant right of sale of the mortgage property was done in good faith in view of the fact that the mortgagee's property was sold far below its value.

On issue one, whether the 1st Defendant was right to exercise its mortgagee's power of sale over the

2nd Plaintiff's property situate at plot 631 Abeokuta Street, Garki 1, A01, Abuja which was used as collateral for the loans granted the 1st Plaintiff by the 1st Defendant?

Learned counsel argued that, from the averment in the 1st Defendant's counter affidavit it was clear that Plaintiffs executed a legal mortgage with the 1st Defendant over the mortgaged property, and that Plaintiffs consistently defaulted in making the payment.

Counsel contended further that mortgagee's power of sale may arise either by express power of sale or by statutory power of sale. Statutory power of sale is provided under section 19(1) of the Conveyance Act 1881 empowers a mortgagee, where the mortgage is made by deed to sell when the mortgage debt has

become due. *DPMS LTD VS LARMIE (2000) 5 NWLR (Pt. 665) 138 at 142.*

On issue two, learned counsel argued that Plaintiff mortgaged his property for a loan facility and upon default, the Respondent gave him written notice of intention to sell the mortgaged property and the letter was never responded to until the property was sold.

It is the argument of counsel that once the mortgagee's power of sale has arisen and becomes exercisable, the mortgagee can decide to sell the mortgaged property either by public auction or private treaty. *FAJULE VS FMB (2001) 2 NWLR (Pt. 697) 384.*

On issue three, whether the 1st Defendant right of sale of the mortgaged property was done in good

faith in view of the fact that the mortgagee's property was sold far below its value.

Learned counsel argued that mortgagee in the exercise of his power of sale, is not liable for bad faith where he sells the mortgaged property at an under value price. *EKA – ETCH VS N.H.D.S LTD (1973) ALL NLR 555.*

On the whole, the court was urged to dismiss the action.

COURT:-I have gone through the affidavit evidence of the Plaintiff in support of the originating summons cum Exhibits annexed therein on one hand, and the counter affidavit filed by the Defendant in opposing the case of the Plaintiff and the Exhibits therein on the other hand.

The gamut of Plaintiffs' case is centered on whether the mortgagee under the Deed of Legal Mortgage rightly exercised its right of sale by disposing off the mortgaged property the way it did, i.e private treaty.

It must be borne in mind that Plaintiff's reliefs 1, 2 and 3 are declaratory in nature thereby predicating the success of other reliefs on its success.

A party who seeks judgment in his favour is required by law to produce evidence to support his pleadings.

It is an established position of law that in cases where declaratory reliefs are claimed as in the present case, the Plaintiff must satisfy the court by cogent and reliable proof of evidence in support of his claim ***AGBAJE VS FASHOLA & ORS (2008) 6 NWLR (Pt. 1082).***

Indeed judicial pronouncement are ad-adim that declaratory reliefs are never granted based on admission or on default of filing defence.

Where the court is called upon to make a declaration of a right, it is incumbent on the party claiming to be entitled to the said declaration to satisfy the court by evidence and not the admission in pleadings.

SAMESI VS IGBE & ORS (2011) LPELR 4412.

The Plaintiff in an attempt to proof its case annexed the following documents to the originating writ;

“1. Application for A N100,000,000.00 (One Hundred Million Naira) Term Loan Facility.

2. Offer of Banking Facility dated 26th January, 2011

3. *Offer of Banking Facility 29th April, 2011*
4. *Letter from Yujalah Holdings Limited dated 7th September, 2012.*
5. *Request for Restructuring and Downward Review of Existing Interest Rate on Loan Facility*
6. *Offer of Banking Facility dated 22nd February, 2013.*
7. *Re: Indebtedness to Guaranty Trust Bank Plc. dated 26th April, 2013.*
8. *Re: Indebtedness to Guaranty Trust Bank Plc. dated 8th May, 2013.*
9. *Re: Offer for purchase of property at Plot 631, Ilorin Close, Area 8, Garki, Abuja*

10. Exercise of the Power of Sale by Guaranty Trust Bank Plc.

11. Customer Statement Yujalah Holdings Limited.”

Indeed, a trial Court has the onerous duty of considering all documents placed before it in the interest of justice. It has a duty to closely examine documentary evidence placed before it in the course of its evaluation and comment or act on it. Documents tendered before a trial Court are meant for scrutiny or examination and evaluation ***MOHAMMED VS ABDULKADIR (2008) 4 NWLR (Pt. 1076) 11 at page 156 – 157.***

Having perused through the documents annexed to the affidavit of the parties, in the opinion of the court, two issues arise for determination to wit;

- a. Whether the 1st Defendant was right to exercise its mortgagee's power of sale over the 2nd Plaintiff's property situate at plot 631 Abeokuta Street, Garki 1, A01 Abuja which was used as collateral for the loans granted the 1st Plaintiff by the 1st Defendant.
- b. Whether the 1st Defendant's right of sale of the mortgaged property was done in good faith in view of the facts that the mortgagors property was sold far below its value.

I shall take the two afore – formulated issues together in my attempt to unravel the mystery.

Indeed a mortgage is defined as the creation of an interest in a property defeasible (i.e annullable) upon performing the condition of paying a given sum of money with interest at a certain time.

The legal consequence of the above definition is that the owner of the mortgaged property becomes divested of the right to dispose of it until he has secured a release of the property from the mortgagee.

Thus, in legal mortgage, title to the property is transferred to the mortgagee subject to the provision that the mortgaged property would be recovered by the mortgagor upon the performance of the conditions stipulated in the mortgage deed and upon payment of the debt at the time stipulated therein.

The mortgagor is liable to repay the loan as stipulated, otherwise the mortgaged property is foreclosed. ***ATIBA IYALAMU SAVING & LOANS LTD VS SUBERU & ANOR (2018) LPELR 44069 (SC).***

It is trite as stated above that a mortgagee's power of sale may arise either by express power of sale or by statutory power of sale. Express power of sale arise from the terms of the mortgaged property in the event of a default by the mortgagor. Where the mortgage instrument contains such express power of sale, the mortgagee may sell the mortgaged property.

The question is, did the mortgage instrument between the parties empower the mortgagee to sale?

The 1st Defendant annexed the tripartite legal mortgage between the parties as Exhibit "A2".

I shall for ease of reference reproduce the relevant paragraph of the agreement. Clause 8(a) of the mortgage instrument provided that, "***The statutory Power of sale shall apply to this Security and such power of sale shall be exercisable by the Mortgagee***

at any time or times after the moneys owing and other liabilities secured by this Security shall have become due and payable without regard to Section 20 of the Conveyancing Act 1881 or Section 125 of the Property and Conveyancing Law 1959 (whichever is applicable) which Section shall not apply to this Security or any sale made by virtue hereof. And in addition to all other protection afforded by statute every purchaser or other third party dealing with the Mortgagee shall be entitled and bound to assume without enquiry that some Mortgage money is owing to the security hereof and that demand therefore has been duly made hereunder and that the Mortgage money has accordingly become due.

Clause 4 (a)(b) and (c).

All the monies hereby secured shall immediately become payable in any of the following events:

- a. On demand being made by the Mortgage.*
- b. If any execution or distress is levied upon or against the property of the Surety/Mortgagor or the Borrower and is not discharged within seven days.*
- c. If the Surety/Mortgagor and or the Borrower shall commit a breach of any of the provisions herein contained.”*

Were Claimants in breach of the afore – reproduced clause 8(a) of Tripartite Deed of legal mortgage!

By Exhibit “D” annexed to the originating summons, Claimants acknowledged that they were in default of the loans facilities granted them. The said letter titled Re: your letter dated 7th September, 2012 OU/REC/12/.1230 dated 18th September, 2012

for clarity 2nd to the last paragraph of the letter read; *“I wish to reiterate for myself and our companies that we are committed to fulfilling our liabilities both small and major and that we will never give the bank any reason to regret doing business with us. As I said earlier, the reasons for the disappointments are purely due to circumstances beyond our immediate control which we are poised to deal with in our collective interest.”*

It is instructive to state that after above letter from the Claimant, the bank again wrote a letter to the Claimant titled RE: indebtedness to Guaranty Trust Bank Plc. dated 26th April, 2013, the content of which I herein reproduce, as follows:-

EXHIBIT “G”

“We refer to the credit facility granted your Company on its current account No. 301-181570-110. As you are aware, the account is currently in debit and has not recorded any reasonable transaction, the outstanding debit balance in the account today is N8,301,323.50k Dr (Eight Million, Three Hundred and One Thousand, Three Hundred and Twenty Three Naira Fifty Kobo only). This is in addition to the outstanding loan obligation of N150,000,000.00 (One Hundred and Fifty Million Naira) only making a total of N158,301,323.50k (One Hundred and Fifty Eight Million, Three Hundred and One Thousand, Three Hundred and Twenty Three Naira Fifty Kobo only).

Despite all our visits and entreaties, we are surprised to note that you have to date failed, refused or neglected to regularize the account.

We urge you once again to kindly expedite action to settle the outstanding balance as soon as possible as per the terms and conditions of our offer letter and the commitment given by your good selves. Failure to respond soonest will leave the bank with no choice but take legal steps to dispose the property securing the facility.

We look forward to your co-operation.”

Plaintiffs replied the said letter vide its letter dated 8th May, 2013 but was served on the Defendant on the 24th May 2013. For avoidance of doubt, the said letter is hereby reproduced, as follows:-

EXHIBIT “H”

“I refer to your letter dated April 26th, 2013 but only received on April 30th, 2013 and the meeting held in my office in Jaji with Your Mallam Aminu Bindawa.

I regret that I have not been able to make the due repayments as at when due and consequently I have decided to liquidate the loan as soon as possible. In order for me to liquidate the loan, I have decided to sell my property that is used as security for the loan. The property is already in the market for sale.

I expect the property to be sold within the shortest possible time, after which the loan will be liquidated. I trust the bank will appreciate my action.

I am therefore seeking a three months moratorium with effect from the date of this letter to allow me conclude the transaction and effect the liquidation of the loan.

In the meantime I am looking forward to an expected dividend from APMT in June with which I can make payments in regards to the accrued interest that is outstanding and I attach herewith a copy of the notice of the AGM from APMT.

Please do not hesitate to contact the undersigned if you have any comments or questions.”

It is instructive to state here that Defendant wrote the letter to the Plaintiffs on the 21st May, 2019, titled:-

“Exercise of the power of sale by Guaranty Trust Bank Plc.”

In the said letter, Defendant informed the Plaintiffs that the property the subject matter of litigation was sold on the 21st May, 2013 due to the Plaintiffs’ failure to liquidate the indebtedness.

Dates don’t lie, especially where it is written on paper.. It is obvious from the date of receipt of Plaintiffs’ letter by the Defendant, the said mortgaged property had been sold.

The law is that once the mortgagee’s power of sale has arisen and becomes exercisable, the mortgagee can decide to sell the mortgaged property either by public auction or private treaty. ***FADULE VS FMB (2001) 2 NWLR (Pt. 697) 384.***

It is instructive to note that, in the instant case,^{1st} Defendant did not sell the mortgaged property by public Auction hence there was no need for notice of sale to be given to the mortgagor.

Indeed, the court of Appeal in ***FLOBBY ENTERPRISE (NIG.) LTD VS NDIC (2019) LPELR 46448*** held that, “a breach of statutory notice to sell and also breach of the conveyancing Act where a conveyance is made in the exercise of the power of sale would not vitiate or cannot be impeached on the ground that no case has arisen to authorise the sale, or that due notice was not given, or that the power was improperly or irregularly exercised.”

The Claimant in establishing this annexed Exhibit “J” which is a letter from Estate Surveyors

&valuerwherein the valuermade offer of Three Hundred Million Naira only (N300,000,000.00) for the outright purchase of the property.

This letter was however not confirmed by an independent valuer.

The law is that a sale of a mortgaged property at under value price is not proof of bad faith, except where the mortgagee sold to itself, nominees or person interested in the property. ***EKA – ETEH VS NHDS LTD (1973) ALL NLR 555.***

The law is also clear that the burden of proof that the mortgagee carried out the sale of the mortgaged property malafide lies on the mortgagor and such burden is discharged only if the mortgagor can show that the mortgagee sold the mortgaged property to

itself. *KWONG LAM VS WONG CHIT SEN (1983)*
ALL ER 54.

Having not placed any evidence of bad faith before the court, this court is not able to conjecture where the wrong, if any committed by the Defendant is...The afore-formulated issues without much ado, are resolved against the Plaintiffs.

I need also mention that the moment a mortgagor signs off on the deed of legal mortgage document, he would have consented to all the dangers involved in legal mortgage.

He is like a boxer who has agreed by implication to be killed and or injured in a boxing bout, and who cannot maintain any further action.

Lacken in merit and substance, the action of Plaintiffs shall fail.

It fails and accordingly, suit **No. CV/467/18** is hereby dismissed.

Justice Y. Halilu
Hon. Judge
26th January, 2021

APPEARANCES

Lawrence John with Al-Ados A. Abubakar - for the Plaintiffs.

Chukwudi Prince Obi – for the Defendants.