

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
[COMMERCIAL DIVISION]**

**ORIGINATING SUMMONS NO.**

**0012 OF 2025**

**IN THE MATTER OF LAND COMPRISED IN LRV HQT 753 FOLIO 19  
BLOCK 182 AT KABUYIRI, BUKONZO**

**AND**

**IN THE MATTER OF A LEGAL MORTGAGE OVER THE SAID  
PROPERTY IN FAVOUR OF THE MICROFINANCE SUPPORT CENTRE**

**AND IN THE MATTER OF AN APPLICATION FOR DELIVERY OF  
VACANT POSSESSION OF THE MORTGAGED PROPERTY**

**BETWEEN**

- 1. THE MICROFINANCE SUPPORT CENTRE  
2. BWAMBALE KALENBAYI JOHNSON:.....:PLAINTIFFS  
VERSUS  
1. KASESE HOSPITAL LIMITED  
2. BAGUMA JOHN HENRY:.....:DEFENDANTS**

**BEFORE: HON. LADY JUSTICE ANNA B. MUGENYI  
RULING**

**INTRODUCTION**

This suit was brought under Order 37 Rule 4 of the Civil Procedure Rules (CPR) for the determination of the following questions:

1. Whether the Plaintiff is entitled to an order of vacant possession of the suit property.
2. Whether the Plaintiff should be granted the costs of this suit.



The Originating summons was supported by the affidavit of Winner Karungi, the senior legal officer of the 1<sup>st</sup> Plaintiff, and opposed by the affidavit in reply of Baguma John Henry, the 2<sup>nd</sup> Defendant and managing director of the 1<sup>st</sup> Defendant.

## **BACKGROUND**

5 The facts giving rise to the present suit are that the 1<sup>st</sup> Defendant was advanced a Murabaha Islamic facility under a facility agreement, which was secured by property comprised in FRV HQT 753 Folio 19 Block 26 Plot 182 at Kabuyiri, Bukonzo County, Kasese District, registered in the name of the 2<sup>nd</sup> Defendant.

10 Following the 1<sup>st</sup> Defendant's default, the Plaintiff commenced the process of foreclosure to recover the outstanding loan balance. The property was subsequently advertised and sold through public auction to the 2<sup>nd</sup> Plaintiff on 19<sup>th</sup> July 2019, and the title was later on transferred to his name.

15 The 1<sup>st</sup> Plaintiff contends that before the transfer was completed, the Defendants brought Civil Suit No. 0684 of 2019 against the Plaintiff, challenging the sale of the mortgaged property, and judgment was entered in favour of the Plaintiff, with the court finding that the Plaintiff was not in breach, there was a valid sale of the property, and the suit was dismissed with costs on 19<sup>th</sup> August 2024.

20 The 1<sup>st</sup> Plaintiff contends that it instructed its auctioneers to immediately evict the 2<sup>nd</sup> Defendant from the suit property and take physical possession of the suit property, but they were barred by the police from doing so and were requested to provide a court eviction notice.

The 1<sup>st</sup> Plaintiff avers that the 2<sup>nd</sup> Plaintiff is the registered proprietor of the property, and the 1<sup>st</sup> Plaintiff has a duty under the law to hand over vacant possession to the registered proprietor as a mortgagee after completing the sale.

25 The 1<sup>st</sup> Plaintiff further avers that the 2<sup>nd</sup> Defendant has consistently refused to hand over vacant possession to the Plaintiff despite numerous notices and engagements, and that it is in the interest of justice that the Plaintiff is granted vacant possession so that he can hand over the same to the registered proprietor.

30 The Defendants, in response, aver that despite the fact that the court dismissed Civil Suit No.0684 of 2019, he has appealed to the Court of Appeal against that decision vide Civil Appeal No. 0951 of 2024, which is pending before the Court of Appeal.

The Defendants also contend that they have applied for a stay of execution of the judgment and the orders of the court vide Miscellaneous Application No. 2727 of



2024, which is pending and that both the appeal and the Application for stay have a high likelihood of success.

5 The Defendants contend that the property was erroneously registered in the names of the 2<sup>nd</sup> Plaintiff since it was done while Civil Suit No. 0684 of 2016 was pending in court.

10 The Defendants aver that the filing of this originating summons is intended to defeat the purpose of the appeal at the Court of Appeal, which is pending before the court and that the issue of evicting the 2<sup>nd</sup> Respondent is res judicata as it was raised by the 2<sup>nd</sup> Defendant in the counter claim in Civil Suit No. 0684 of 2019 and cannot be raised now.

### REPRESENTATION

The Plaintiff was represented by M/s Orima & Co Advocates, whereas the Defendants were represented by M/s Masereka, Mangeni & Co Advocates.

### ANALYSIS & DETERMINATION

15 I have carefully read and considered the affidavit evidence of the parties and the submissions of counsel for the parties.

The main issue for consideration is whether the Plaintiffs are entitled to vacant possession of the mortgaged property.

The Plaintiffs relied on **Order 37 rule 4 of the CPR**, which provides that;

20 “Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject 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 as 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  
25 as the circumstances of the case may require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance or delivery of possession by the mortgagee.”

30 The Plaintiffs brought this suit by way of originating summons. It is settled law that such procedure is only appropriate where the issues are simple, uncontested, or capable of resolution on affidavit evidence alone.

This position was echoed in the case of **Nakabugo v Serunjogi (1981) HCB 58**, where the court held that:

*“It is trite law that when disputed facts are complex and involve a considerable amount of oral evidence, an Originating Summons is not the proper procedure to take”.*

5 In the present case, the Plaintiffs seek for an order of vacant possession in a straightforward matter which does not consider a considerable amount of oral evidence and is therefore rightly brought through Originating Summons.

10 Having resolved that the procedure of Originating Summons under Order 37 Rule 4 of the CPR is competent and appropriate given the straightforward nature of the facts, I now turn to the substantive determination of whether the Plaintiffs are entitled to an order of vacant possession.

The law governing mortgages is enshrined in the Mortgage Act and Section 19 (e) of the Mortgage Act (Cap 239) provides that:

*“Where the mortgagor is in default and does not comply with the notice served on him or her under section 18, the mortgagee may sell the mortgaged land”.*

15 Section 27(4) of the Mortgage Act provides that:

20 *“Upon registration of the transfer by the Registrar of Titles or recorder, the interest of the mortgagor as described in the transfer shall pass to and vest in the purchaser free of all liability on account of the mortgage, or on account of any other mortgage or encumbrance to which the mortgage has priority, other than a lease or easement to which the mortgagee had consented in writing”.*

Further, Section 28(1) of the Mortgage Act provides that:

*“A purchaser in a sale effected by a mortgagee acquires good title except in a case of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which the purchaser has actual or constructive notice”.*

25 In the instant case, the 1<sup>st</sup> Plaintiff exercised its statutory power of sale on July 19, 2019, following the 1<sup>st</sup> Defendant’s default on a Murabaha Islamic facility. The property was sold to the 2<sup>nd</sup> Plaintiff, who is now the registered proprietor. The validity of this very sale was already litigated and upheld by this Court in Civil Suit No. 0684 of 2019, with judgment delivered on August 19, 2024.

30 It is trite law that upon a lawful sale and transfer under a mortgage, the purchaser acquires full ownership rights and is entitled to quiet and vacant possession of the property.



This principle is underpinned by the statutory indefeasibility of title accorded to the registered proprietor under Section 59 of the Registration of Titles Act (RTA) (Cap 240).

5 Upon this legal sale, the 1<sup>st</sup> Plaintiff owes a duty to deliver vacant possession to the 2<sup>nd</sup> Plaintiff. The 2<sup>nd</sup> Defendant, having lost ownership rights upon the execution of the sale and subsequent registration of the transfer, has no legal colour of right to remain on the property.

10 This court takes cognisance of the fact that the Defendants heavily rely on the fact that they have preferred an appeal to the Court of Appeal vide Civil Appeal No. 0951 of 2024, contending that the present Originating Summons is a backdoor mechanism to defeat that appeal.

It is an elementary principle of civil procedure that an appeal does not operate as an automatic stay of execution.

15 In **Andrew Oluka v CNOOC Uganda Limited, Miscellaneous Application No. 514 of 2022**, it was emphasized that a successful litigant should not be starved of the fruits of their judgment merely because the losing party has filed a notice of appeal.

20 Further, the record before this Court dispels any defence anchored on a pending stay as Miscellaneous Application No. 2727 of 2024, relied on by the Defendants, was closed administratively for non-payment of court fees and the subsequent Application, Miscellaneous Application No. 0469 of 2025, was formally heard and dismissed on August 29, 2025 with costs for failure to meet the legal requirements for an order of stay of execution.

25 Consequently, there is no lawful order stopping the execution or enforcement of the rights flowing from the judgment in Civil Suit No. 0684 of 2019. The Plaintiffs are fully entitled to seek vacant possession to enjoy the fruits of that judgment.

Further, the Defendants contend that the issue of eviction is res judicata because it was raised by the 2<sup>nd</sup> Defendant in his counterclaim in Civil Suit No. 0684 of 2019. This argument is legally flawed.

30 The doctrine of res judicata, codified under Section 7 of the CPR (Cap 282) bars the litigation of an issue or suit that has already been heard and finally decided between the same parties by a court of competent jurisdiction. For res judicata to apply, the matter must have been directly and substantially in issue and determined on its merits.

In Civil Suit No. 0684 of 2019, the primary issue was the validity of the mortgagee's sale. The Court dismissed the Defendants' suit, finding that the 1<sup>st</sup> Plaintiff was not in breach and that the sale was valid. By dismissing the suit (and any accompanying counterclaim seeking to stop the sale/eviction), the court did not grant the Plaintiffs physical possession; it merely validated their legal path to it.

The current Application for vacant possession under Order 37 Rule 4 is not a relitigation of the validity of the sale. Rather, it is a consequential, statutory procedure to enforce the rights resulting from that valid sale because the 1<sup>st</sup> Plaintiff's auctioneers were barred by the police without a formal court eviction order.

Far from being res judicata, this suit is the direct lawful consequence of the judgment in Civil Suit No. 0684 of 2019. To hold otherwise would mean a successful party in a property dispute could never enforce its right to possession.

The evidence on record shows that the 2<sup>nd</sup> Plaintiff is the registered proprietor of the suit property. Registration confers upon him all proprietary rights attached to ownership, including the right to possession and quiet enjoyment of the property. The Defendants have not demonstrated any legal basis upon which they can continue occupying the property after the lawful sale and transfer thereof.

In **Kampala Bottlers Ltd v. Damanico (U) Ltd SCCA No. 22 of 1992**, the Supreme Court held that a certificate of title is conclusive evidence of ownership unless it is impeached in accordance with the law. The Defendants have not obtained any court order nullifying the transfer of the suit property to the 2<sup>nd</sup> Plaintiff, nor have they secured any stay preventing the enforcement of the rights flowing from such ownership.

Accordingly, I find that the Plaintiffs have established their entitlement to vacant possession of the suit property.

Costs ordinarily follow the event and are awarded at the discretion of the court. I find no reason to depart from this general principle. Having succeeded in their claim, the Plaintiffs are entitled to the costs of this suit.

Consequently, this Application succeeds, with the following orders:

- 1. The Plaintiffs are granted an order for vacant possession of the property comprised in FRV HQT 753 Folio 19 Block 26 Plot 182 at Kabuyiri, Bukonzo County, Kasese District.**



2. The Defendants shall vacate and hand over vacant possession of the suit property to the Plaintiffs within ninety (90) days from the date of this judgment.
3. In default of compliance, the Plaintiffs shall be at liberty to execute this order through lawful eviction.
4. The Plaintiffs are awarded the costs of this suit.

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.....*Ms. Bitane*.....

**HON. LADY JUSTICE ANNA B. MUGENYI**

**DATED.....***10/6/2026***.....**

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