

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 1271 OF 2023

*(Arising from Civil Appeal No. 1553 of 2023 and High Court Civil Suit
No. 42 of 2020)*

1. HARUNA ENTERPRISES (U) LTD
2. HARUNA SENTONGO :..... APPLICANTS

VERSUS

1. DIAMOND TRUST BANK (U) LTD
2. DIAMOND TRUST BANK (KENYA) LTD :..... RESPONDENTS

BEFORE: HON JUSTICE OSCAR KIHKA, JA

(Sitting as a single Justice)

RULING OF COURT

This application was brought under Rule 2(2), 43 and 44 of the Judicature (Court of Appeal Rules) Directions seeking for orders that;

- (a) A temporary injunction restraining the Respondents, their agents, representatives, nominees, assignees and/or successors in title from selling, transferring, alienating, evicting, dealing with and or in any way interfering with the Applicant's interest and possession of the properties comprised

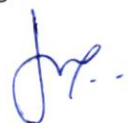


in Block 12 Plots 538, 826 and 898 at Mengo until the termination of the appeal.

(b) Costs for this application be provided for.

The application is supported by the affidavit of SENTONGO HARUNA sworn on the 1st of December 2023. The grounds upon which this application is premised are laid out in the Notice of Motion and the affidavit in support and are briefly that;

1. The Applicant is the registered proprietor of the properties comprised in Block 12 Plots 538, 826 & 898 at Mengo which is developed with a market.
2. On 17th January 2020, the Applicants filed seeking, among others, cancellation of the Security Realization Agreement between the Applicants and the Respondents dated 2nd November 2019 which was fraudulently executed.
3. On 30th March 2023 when Civil Suit No. 42 of 2020 came up for hearing, the Respondents requested for an adjournment to file their trial bundle and the learned Judge issued timelines for filing witness statements, trial bundles and a joint scheduling memorandum.
4. However, on 18th April 2023, the Applicants applied for leave to amend their plaint and the same was granted.
5. On 21st June 2023, the Applicants filed their amended plaint and on 27th November 2023, the Respondents filed an application seeking for further and better particulars.



6. On 29th November 2023, the suit came up for hearing before the learned trial Judge who dismissed it with costs under Order 17 Rule 4 of the Civil Procedure Rules for failure to file within time.
7. The failure to file within the timelines was caused by the grant of an order for leave to amend the plaint and the subsequent pleadings.
8. The Respondents equally did not file their trial bundle as directed by court.
9. The Applicants filed a Notice of Appeal and a letter requesting for proceedings.
10. The appeal is meritorious and has a likelihood of success.
11. There is a serious threat as the Respondents have sent brokers to the suit land claiming the property as available for sale after the dismissal of Civil Suit No. 42 of 2020.

The Respondents filed an affidavit in reply deposed by EMEJEIT MBABAZI sworn on the 11th of November 2023 opposing the application on the grounds that;

1. The dismissal of Civil Suit No. 42 of 2020 was pursuant to Order 17 Rule 4 of the Civil Procedure Rules and the sale can only be carried out pursuant to the mortgage.
2. As per the Mortgage Regulations 2012, the Applicants must deposit 30% of the forced sale value in order to stop the intended sale of the property.
3. The 30% of the outstanding loan sum is 2,960,664,913.5 for DTB Uganda and USD 1,984,225.2 for DTB Kenya.



4. The Applicants are bound by the Security Realization Agreement which placed the Applicants in indebtedness to the Respondents at Shs. 9,868,883,045/= to DTB Uganda and USD 6,614,084 to DTB Kenya.
5. The Applicants cannot approbate and reprobate and thus have no valid appeal.

Representation

At the hearing of this application, Mr. Derrick Bazekuketta appeared for the Applicant, with the Applicant in attendance, while Mr. Stephen Zimula appeared for the respondent. Both parties filed written submissions and the same were adopted as their legal arguments.

Mr. Zimula raised preliminary points of law at the hearing of this application and in the written submissions, which I find pertinent to address first.

Preliminary points of law.

Mr. Zimula submitted that this application is incompetently before this court as the same ought to have been first filed at the High Court under Rule 42(1) of the Judicature Court of Appeal Rules Directions SI 13-10.

In addition, the Respondent's counsel submitted that the order in H.C.C.S No. 42 of 2020 is a negative order that is not capable of being stayed. Counsel submitted that the rule against issuing a stay order in respect of a negative order cannot be circumvented merely by



terming the order sought as an 'injunction'. Counsel relied on the decision in **Kare Distribution Ltd and Karegeya Geoffrey Vs NCBA Bank Civil Application No. 100 of 2023** in which an application for an order of stay of execution was dismissed for reasons that the order the Applicant sought to stay was a negative order.

In reply to the preliminary points of law, Mr. Bazekuketta submitted that in an application for a temporary injunction, it is not mandatory for the Applicant to first file the Application at the High Court. He relied on the decision in **Kisawuzi Vs DFCU Bank Ltd Civil Application No. 0064 of 2016 [2016] UGCA 7** for the proposition that an application for a temporary injunction can be filed at the Court of Appeal without being filed at the High Court first. Mr. Bazakuketta argued that the application before this court is one seeking for a temporary injunctive order and the same is validly before this court.

With regard to the second preliminary point of law, Mr. Bazekuketta submitted that this application is for a temporary injunction and not an order of stay of execution of a negative order. He argued that the Respondent appears to confuse an application for stay of execution with an application for a temporary injunction. An injunction order requires a party to refrain or to do a particular act.

Consideration of preliminary points of law

The first preliminary point of law is in regard to the competence of this application. Rule 42 of the rules of this Court provides as follows:

“42. Order of hearing applications.

(1) Whenever an application may be made either in the court or in the High Court it shall be made first in the High Court.

(2) Notwithstanding sub rule (1) of this rule, in civil or criminal matter, the court may, on application or of its own motion, give leave to appeal and grant a consequential extension of time for doing any as the justice of the case requires, or entertain an application under rule 6 (2) (b) of these Rules, in order to safeguard the right of appeal, notwithstanding the fact that no application for that purpose has first been made to the High Court.”

Rule 42 above requires a party to first file such an application in the High Court first, where both this Court and the High Court have concurrent jurisdiction. Mr. Bazekuketta referred me to the decision in **Ganafa Peter Kisawuzi Vs DFCU Bank Ltd Civil Application No. 0064 of 2016 [2016] UGCA 7**, which I find relevant to this preliminary point of law. In that case, this court (full bench) held as follows;

“Regarding the temporary injunction, 0.41 (1) of the Civil Procedure Rules (CPR) provides that:

“Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to



***the suit, or wrongfully sold in execution of a decree;
or***

(b) that the defendant threatens or intends to remove or dispose of his or her property with a view to defraud his or her creditors, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders”.

The CPR is applicable to the High Court and the subordinate courts thereto. From the above provision, one can apply for a temporary injunction only when there is a pending suit before the court which has not been disposed of, In the present application, the Applicant could not apply for a temporary injunction in the High Court because the suit was disposed of when judgment was delivered. There is no requirement for an application for a temporary injunction to first be filed in the High Court.

In the instant case, High Court Civil Suit No. 42 of 2020 which was filed by the Applicant was dismissed. It therefore would not be possible for the Applicant to file an application for a temporary injunction in the High Court in the absence of a pending suit. Thus, the only option available to the Applicant was to file the application to this court. I therefore find that this application for a temporary

injunction is properly before this court. The first preliminary point of law is thus over ruled.

The Respondent's counsel argues that this application is seeking a stay of a negative order of dismissal which is not capable of being stayed. From the wording of the orders being sought for by the Applicant, it is clear that this application seeks an order for a temporary injunction against the Respondents restraining them from interfering with the Applicant's interest and possession of the properties comprised in Block 12 Plots 538, 826 and 898 at Mengo until the termination of the appeal. The Respondent relied on the decision in **Kare Distribution Ltd and Karegeya Geoffrey Vs NCBA Bank Civil Application No. 100 of 2023**. The facts pertaining to that case are, however, distinguishable from the facts in this case. In that case, the Applicant sought an injunction order against the Respondent on property that was not subject of the appeal.

In this case, the Applicants seek an injunction not against the decision of the court but enforcement of the mortgage pending determination of Civil Appeal No. 1553 of 2023. The second preliminary objection is thus over ruled.

Consideration of the application

I have carefully considered the affidavits and the submissions of both parties. I have also perused the authorities provided by counsel for which I am grateful.



The jurisdiction of this court to grant a temporary injunction stems from **Rule 6 (2) (b)** of the Rules of this Court which provides as follows;

6. Suspension of sentence and stay of execution.

(2) Subject to subrule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may—

(a) ...

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of these Rules, order a stay of execution, an injunction, or a stay of proceedings on such terms as the court may think just.

Thus, a temporary injunction is intended to maintain the status quo of things pending the determination by court of some serious cause pending before it. In **Robert Kavuma Vs Hotel International Supreme Court Civil Appeal No.8 of 1990**, Wambuzi CJ, as he then was, held:-

"It is generally accepted that for a temporary injunction to issue, the court must be satisfied:-

- i. That the Applicant has a prima facie case with a probability of success.*
- ii. That the Applicant might otherwise suffer irreparable damage which would not be adequately compensated for in damages.*



iii. *If the court is in doubt, on the above two points, then the court will decide the application on a balance of convenience. In other words, whether the inconveniences which are likely to issue from withholding the injunction would be greater than those which are likely to arise from granting it”.*

Thus, the granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve the matters in the status quo until the question to be investigated in the main suit is finally disposed of. The conditions for the grant of a temporary injunction are;

1. Firstly, that, the applicant must show a prima facie case with a probability of success.
2. Secondly, such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.
3. Thirdly if the Court is in doubt, it would decide an application on the balance of convenience.

An order for a Temporary Injunction is granted so as to prevent the ends of justice from being defeated.

1. *Prima facie* case with likelihood of success

The Supreme Court in the case of **Gashumba Maniraguha vs Sam Nkudiye Civil Application No. 24 of 2015**, in effect held that the likelihood of success, is the most important consideration in an application for stay of execution. Therefore, it is incumbent upon the



Applicant to avail evidence, or material to the court in order for it to establish whether or not the Applicant has a prima facie case on appeal.

I have carefully read the submissions by counsel for the Applicant and the Respondent, the affidavits on record and the law applicable. On the issue of likelihood of success, the applicant stated in paragraph 17 of the affidavit in support of the application that the appeal is meritorious, raises serious questions for determination pf this court and has a high likelihood of success. The Applicant attached the Memorandum of Appeal marked annexure J.

The Applicant contends in paragraphs 4 to 15 of the affidavit in support that on 30th March 2023, Civil Suit No. 42 of 2020 came up for hearing and timelines were issued for filing witness statements, trial bundles and a joint scheduling memorandum. On 14th April, the Applicant filed his witness statement and on 18th applied for leave to amend the plaint, which leave was granted. Following the grant, the Applicant filed an amended plaint on 21st June 2023 and in November, the Respondents filed an application seeking for further and better particulars. On 29th November 2023, the trial Judge dismissed the suit under Order 1 Rule 4 of the Civil Procedure Rules.

The Court of Appeal of Kenya described an arguable appeal in **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] e KLR** in the following terms:

“vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court;



one which is not frivolous. viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

The decision in **Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others (supra)** is of persuasive value and I would adopt the same reasoning in this case. It is not the duty of this court to pre-empt considerations of matters for the full bench in determining the appeal, but to determine whether the appeal is frivolous. In the instant case, the applicant not only attached the Memorandum of Appeal but also laid out the questions for this court to determine in the appeal.

It is therefore my considered view that the applicant has established that he has a prima facie case pending determination before this court.

2. Irreparable damage

The second consideration is whether the applicant will suffer ***irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.***

In this regard, the Applicant stated in paragraphs 18 to 22 of his affidavit in support of the application that he acquired the suit land in 2014 and it took him over 5 years to develop the same with a market he named ‘Nakayiza’ after his mother. He stated that he has a sentimental attachment on the property that cannot be compensated for in damages if the property is sold. The property in



the instant case, the subject of the appeal before this court, is a commercial building with a market whose rent proceeds can be ascertained.

However, I must note that the applicant's suit at the trial court was never heard on its merits having been dismissed under Order 17 Rule 4 of the Civil Procedure Rules for failure to file the trial bundle within the stipulated timelines. The Applicant has stated in his affidavit that the failure was occasioned by the grant of the application for leave to amend his plaint and the Respondent's application for further and better particulars. The Applicant would, in my view, suffer irreparable damage if he be condemned unheard contrary to **Articles 28(1) and 44 (c) of the Constitution of the Republic of Uganda** under which the right to a fair hearing is non-derogable.

In my understanding, the applicant has to show that the damage bound to be suffered is such that it cannot be undone. It is therefore my considered view that the Applicant will suffer irreparable damage if this application is not granted.

3. Balance of Convenience

Balance of convenience lies more on the one who will suffer more if the respondent is not restrained in the activities complained of in the suit. Therefore, in arriving at the proper decision whether the balance of convenience favors the applicant or not, court must weigh the loss or risk at exposure for the applicant in the event the order is denied and the damage which could be suffered if it is not granted. See **Jayndrakumar Devechand Devani Vs. Haridas Vallabhadas**



Bhadresa & Anor, Civil Appeal No. 21 of 1971 (Court of Appeal of East Africa)

In essence, court should examine the prejudice and the injury both parties are likely to suffer if the stay is granted or denied.

In this case the applicant is in possession of the suit property, a commercial building with various tenants carrying out business and the sale of the property will be to the detriment of the applicant. The applicant prayed for a temporary injunction maintaining the status quo until the determination of the appeal pending before this court. I believe the balance of convenience favors the applicant who is in possession and stands to be prejudiced if the suit property is sold.

It is therefore my considered view that the applicant in this case has made out a case for the issuance of a temporary injunction restraining the respondent from the sale or interference with the suit property until the applicant's appeal vide Civil Appeal No. 1553 of 2023 is disposed of by this court. The issue of Regulation 13(1) of the Mortgage Regulations as argued by Mr. Zimula, does not arise in this case where there is no adjournment of a sale being sought. The subject matter is the suit property, of which the facts surrounding the mortgage have not been determined by the trial court on the merits.

In the result, I allow this application and make the following orders;

1. An order of a temporary injunction is hereby issued restraining the respondents, their agents, representatives, nominees,



assignees and/or successors in title from selling, transferring, alienating, evicting, dealing with and or in any way interfering with the Applicant's interest and possession of the properties comprised in Block 12 Plots 538, 826 and 898 at Mengo until the termination of Civil Appeal No. 1553 of 2023.

2. Costs shall abide the outcome of the appeal.

Dated this 19th day of April 2024

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OSCAR JOHN KIHICA
JUSTICE OF APPEAL