THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 0625 OF 2008

(Arising from Civil Suit No. 0300 of 2008)

1. LWEZA CLAYS LIMITED }
2. KIZITO LUTWAMA MOUSA } …… APPLICANTS

VERSUS

1. TROPICAL BANK LTD } ……. RESPONDENTS
2. FRED MUWEMA (RECEIVER) }

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

During the months of February and August, 2007, the 1st and 2nd applicants borrowed shs. 1,450,000,000/= and shs. 400,000,000/= respectively from the 1st respondent. The loans were secured by multiple mortgages and debentures issued by them respectively. When the applicants defaulted on their repayment obligations, the 1st applicant appointed the 2nd applicant Manager of the applicant's business. The applicants then filed a suit challenging the legality of the instruments securing the borrowing. The suit together with the 1st respondent's counterclaim were dismissed summarily on 7th September, 2009. The applicants appealed that decision to the Court of Appeal. The Court of Appeal reversed that decision and directed a trial *de novo* before a different Judge. The applicants appealed further to the Supreme Court which in it decision delivered on 20th December, 2021 upheld the decision of the Court of Appeal, hence the re-instatement of the suit and re-vitalisation of this application.

b. The application.

The application is made by Chamber Summons under the provisions of section 98 of *The Civil Procedure Act*, and Order 41 rules l, 2, and 9 of *The Civil Procedure Rules*. The applicant seeks a temporary injunction order restraining the respondents from selling by private treaty or public auction the applicants business and property, and from evicting the applicants, intimidating or

otherwise interfering with their quiet possession and enjoyment of the said properties, and restraining the 2nd respondent from acting as Receiver / Manager until final disposal of the suit.

It is the applicants' case that they have filed a suit which is still pending, challenging the validity of a further charge by way of mortgage created by the 1st respondent in respect of land comprised in Kyadondo Block 244 Plot 2506 at Kisugu; Kibuga Block 12 Plots 658, 659 and 665; Kibuga Block 4 Plot 152 along Kisingiri Road; Busiro Block 267 Plot 280 at Lweza as well as the debentures created in respect of the applicant's machinery and factory equipment. They contend further that the suit challenges the appointment of the 2nd respondent as receiver / manager, as being premature and he has since his appointment mismanaged the business and assets of the applicants. The 2nd respondent has since his appointment sold off land comprised in Kyadondo Block 10 Plots 329 and 320. Machinery including a tractor-wheel loader, clay building products, all at gross undervalues, and withdrawn funds from the applicant's bank accounts. The 1st respondent is said to have recalled the loan prematurely such that the attachment and sale of some of the property that followed was done in bad faith. The applicants are likely to suffer irreparable damage or loss if the order ids not granted, and the suit will be rendered nugatory. The applicants have in the meantime lodged caveats of the titles to the land.

c. <u>The affidavits in reply.</u>

By an affidavit in reply sworn by the 1st respondent's Acting Head of Recoveries, it is contended that proceeds from the land sold were credited to the bank account of the 1st applicant. The 1st respondent has no knowledge of the alleged sales of machinery by the 2nd respondent. The 1st applicant's indebtedness stood at shs. 17,267,329,060 and that of the 2nd respondent at shs. 1,672,210,699/= as at 10th October, 2018. Deficiencies in the documents securing the debt were subsequently rectified. There can be no irreparable injury or loss occasioned to the applicants by the mere fact that they opted to use the affected properties as security for that borrowing. In the alternative, grant of the order should be subjected to the requirement of payment of the 30% of the sum of shs. 19,000,000,000/= currently owing, as required by the Mortgage Regulations, which is a sum of shs. 5,700,000,000/=

In his affidavit in reply, the 2nd respondent contends that he was duly appointed receiver by the 2nd respondent on 18th August, 2007. He took effective control of the 1st applicant's business premises on 12th November, 2008. He subsequently laid off the majority of the staff and maintained only a skeleton staff to enable him run the business. He paid off salary arrear of staff and met the cost of completion of the processing of clay products that he found at various levels of the production process. Grating the order and returning management and control to the applicants would disrupt the current status of the business. The assets of the applicants are not in danger of wastage or pilferage. He denies having sold any machinery and equipment, sold any clay products nor withdrawn money from the applicants' bank accounts as alleged.

d. Submissions of counsel for the applicant.

M/s Semutryaba, Iga, and Co. Advocates, on behalf of the applicants submitted that the applicants obtained an interim injunction restraining sale of the applicant's property. The decision in the suit was against the applicant but the respondent appealed to the Court of Appeal. Another injunction was granted while the matter was in the Court of appeal. The judgment of the trial Judge was set aside and a trial *de-novo* ordered, A further appeal was made or the Supreme Court. It too granted an injunction preventing a sale. During the 14 year period, the main application was not heard. The receivership was lifted. The 2nd respondent handed over the factory of the applicant. The last two properties out of the eight were disposed of. The six are in court. The matter involves debentures, chattel mortgage and it is a matter of mixed law. They have a counterclaim which is yet to be determined. The Supreme Court has decided that once the matter is in court, they had to wait. Annexure J1 is the decision of justices of the Supreme Court. The bank appointed a receiver who took over properties including machinery, stock and money on the account and disposed of several of them; a tractor, stocks of clay products, withdrew funds from the account. The receiver never accounted. Over shs. 900,000,000/= At the time a sum of shs. 80,000,000/= was outstanding on the personal loan. The other was shs. 1,200,000,000/= on the corporate loan.

e. Submissions of counsel for the 1st respondent.

Mr. Timothy Masembe Kanyerezi with Mr. Timothy Lugayizi on behalf of the 1st respondent submitted that in the affidavit of the applicant para 7 and 10. Para 10 of Stellas's affidavit responds as per B1 which shows the sale was by the 2nd applicant. B2 is a letter he wrote that he had a buyer. B3 shows that the proceeds of sale and B4 the other sale he received the money. B5 the money went to his personal account. In paragraph 10 of the applicant he said that the 2nd respondent sold his tractor and clay products. Section 181 (3) of *The Insolvency Act* provides that a receiver is an agent of the debtor. The debt then was shs. 1,200,000,000/= Annexure "J" to the affidavit was about an interim order pending the main application. The ruling related to appellate process. He did not say that at trial the rule requiring deposit of 30% should not be applied.

f. Submissions of counsel for the 2nd respondent;

Mr. Kagoro Friday Roberts on behalf of the 2nd respondent submitted that there is no document showing the sale as claimed by the applicants. The alleged sale is not proved.

g. The decision.

It has been established by the law and the decided cases that, the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the *status quo* between the parties pending the disposal of the main suit. The conditions for the grant of an interlocutory injunction are now, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (see *E.A. Industries v. Trufoods, [1972] E.A. 420*). The conditions that have to be fulfilled before court exercises its discretion to grant an interlocutory injunction have been well laid out as the following:-

1. The Applicant has shown a *prima facie* case with a probability of success.
2. The likelihood of the applicants suffering irreparable damage which would not be adequately compensated by award of damages.
3. Where in doubt in respect of the above 2 considerations, then the application will be decided on a balance of convenience (see *Fellowes and Son v. Fisher [1976] I QB 122*).

These principles can be found in such cases as *American Cyanamid Co v. Ethicon Limited [1975] AC 396*; *Geilla v Cassman Brown Co. Ltd [1973] E.A. 358* and *GAPCO Uganda Limited v. Kaweesa and another H.C. Misc Application No. 259 of 2013*.

i. Whether the applicant has a *prima facie* case against the respondents.

First, a preliminary assessment must be made of the merits of the suit that has been filed against the respondents, to ensure that there is a "serious question to be tried." One of the criteria to be applied when considering whether or not to grant a temporary injunction is disclosure by the applicant's pleadings, of a "serious triable issue," with a possibility of success, not necessarily one that has a probability of success (see *American Cyanamid v. Ethicon [1975] AC 396; [1975] ALL ER 504; Godfrey Sekitoleko and four others v. Seezi Peter Mutabazi and two others, [2001 –2005] HCB 80* and *Nsubuga and another v. Mutawe [1974] E.A 487*). There is no need to be satisfied that a permanent injunction is probable at trial; the court only needs be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. A serious question is thus any question that is not frivolous or vexatious. As long as the claim is not frivolous or vexatious, the requirement of a *prima facie* case is met.

The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried, and that there is at least a reasonable chance that the applicant will succeed at trial. The applicant needs to show only a reasonable likelihood of success on the merits. The applicant's burden on this part of the test is relatively low, and in most cases an applicant will be able to show that there is a serious question to be tried. The applicant is required to provide reasonably available evidence to satisfy the court with a sufficient degree of certainty that the applicant is the rights-holder and that his or her rights are being infringed, or that such

infringement is imminent. The applicant must show a strong probability that the feared conduct and resulting damage will occur.

Although the merits of the parties' respective cases and their relative strengths are not to be considered at this stage, the court should bear in mind that in a suit of this nature, the applicants must show that nullification of the securitisation of the borrowing absolves them of liability for repayment of the loan. In the counterclaim, the 1st respondent contends that none of the applicants has cleared their loan obligations to-date. In the written statement of defence and the affidavit n reply, the 1st respondent contends further that that anomalies that existed hitherto in the securitisation of the borrowing have since bene rectified. As mater stand, the thrust of the applicants' case seems to be directed at voiding the securities without challenging substantially the validity of the underlying loans. Be that as it may, the pleadings of both parties raise pertinent issues of law and fact. I am therefore satisfied that the claim is not frivolous or vexatious; there are serious questions of law and fact to be tried. Accordingly, a *prima facie* case has been established.

ii. Whether the applicant will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue).

Second, the applicant must show that she will suffer irreparable harm if the court refused to grant the injunction and the respondents were allowed to continue in their course of conduct. "Irreparable" in this context refers not to the size of the harm that would be suffered, but its nature. If the harm could not be quantified by payment of money, or if the harm is not readily calculated or estimated, this part of the test will usually be satisfied. In some cases, the availability of damages often precludes such a finding.

Irreparable damage has been defined by *Black's Law Dictionary*, 9th Edition page 447 to mean; "damages that cannot be easily ascertained because there is no fixed pecuniary standard of measurement." It has also been defined as "loss that cannot be compensated for with money" (see *City Council of Kampala v. Donozio Musisi Sekyaya C.A. Civil Application No. 3 of 2000*). The purpose of granting a temporary injunction is for preservation of the parties, legal rights pending

litigation. The court doesn't determine the legal rights to the property but merely preserves it in its current condition until the legal title or ownership can be established or declared. If failure to grant the injunction might compromise the applicants' ability to assert their claimed rights over the land, for example when intervening adverse claims by third parties are created, there is a very high likelihood of occasioning a loss that cannot be compensated for with money. In this case, the learned Assistant Registrar did not advert to this requirement. This too was an error of omission. Regarding the balance of convenience, the learned Registrar did not express an opinion at all. This too was an error of omission.

The Court may grant a temporary injunction if it is apparent that the respondent is about to embark on a course of action that would infringe an applicant's rights. The court will particularly be inclined to grant the injunction where there appears to be a *prima facie* breach of property rights, or where the potential harm that could flow should a court order not be granted is difficult or impossible to calculate and quantify at a later stage in the suit.

As an injunction is an equitable and discretionary remedy, it is a general rule that an injunction will not be granted where damages are an adequate remedy. Before an injunction is ordered, it must be established that an award of damages is not an adequate remedy. That type of claim can be made in exceptional cases involving breach of contract, akin to a breach of fiduciary duty, where the normal remedies are inadequate and where deterrence of others is an important factor. An injunction ought not to have been granted where the respondent would be restored to the financial position it would have been. In order to establish that damages are not adequate, the innocent party will generally have to evidence either that a) the subject matter of the contract is rare or unique or b) damages would be financially ineffective.

Examples of rare or unique subject matters might be the sale of an interest in land (as no two pieces of land are the same) or a one-off antique vase. In both scenarios, damages may not be an adequate remedy because no market substitute exists, and the innocent party would therefore be unable to secure equivalent performance (no matter what the price). Examples of circumstances where damages may be financially ineffective might be where the defaulting party is insolvent and unable to pay; if damages would be difficult to quantify (e.g. a contract to indemnify); if an order for the

payment of damages would be difficult to enforce (e.g. because any enforcement would need to be in a foreign country); or if an express term of the contract restricts or limits the damages recoverable for that particular breach.

I find that the pleadings show that the property in issue was mortgaged to the 1st respondent as security for a loan. The transaction that has exposed the property to the danger of being lost by sale is thus of a purely commercial nature. The property mortgaged property is not the subject matter of the suit, rather its perfection as security for a borrowing. Any person who mortgages their property does so in contemplation of its sale upon default. It is the practice to value the property before the mortgage is registered. Such valuation is suggestive of the fact that market substitutes exist and the mortgagor would therefore be able to secure its equivalent in value upon a wrongful sale.

This therefore essentially is a case in which, if the applicants succeed, the court will be required to make an award of damages to compensate them as rights holders for economic injury suffered through the violation of property rights, if proved. I therefore do not find this to be case in which the applicants are likely to suffer loss or injury that cannot be quantified by payment of money, or that it cannot be readily calculated or estimated.

iii. Balance of convenience (whether the threatened injury to the applicant outweighs the threatened harm the injunction might inflict on the respondents).

The third part of the test involves the court assessing which of the parties would suffer greater harm from the granting or refusal of the injunction pending trial. Unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the applicant has any real prospect of succeeding in his or her claim at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

This part of the test is referred to as the "balance of convenience." Balance of convenience means comparative mischief or inconvenience that may be caused to the either party in the event of refusal

or grant of injunction. It is necessary to assess the harm to the applicant if there is no injunction, and the prejudice or harm to the respondent if an injunction is imposed. The courts examine a variety of factors, including the harm likely to be suffered by both parties from the granting or refusal of the injunction, and the current *status quo* as at the time of the injunction.

The Court has the duty to balance or weigh the scales of justice by ensuring that the suit is not rendered nugatory while at the same time ensuring that a respondent is not impeded from the pursuit of his or her contractual rights. No doubt it would be wrong to grant a temporary injunction order pending disposal of the suit where the suit is frivolous or where such order would inflict greater hardship than it would avoid. Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application, some disadvantages which his or her ultimate success at the trial may show he or she ought to have been spared and the disadvantages may be such that the recovery of damages to which he or she would then be entitled would not be sufficient to compensate him or her fully for all of them.

The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his or her succeeding at the trial is always a significant factor in assessing where the balance of convenience lies. The governing principle is that the court should first consider whether if the applicant were to succeed at the trial in establishing his or her right to a permanent injunction, he or she would be adequately compensated by an award of damages for the loss he or she would have sustained as a result of the respondent's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the respondent would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the applicant's claim appears to be at this stage.

If, on the other hand, damages would not provide an adequate remedy for the applicants in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the respondents were to succeed at the trial in establishing their right to do that which was sought to be enjoined, they would be adequately compensated by the applicants for the loss they would have sustained by being prevented from doing so between the time of the

application and the time of the trial. If damages would be an adequate remedy and the applicant would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

From the plaint, the relevant considerations are that the applicants seek to have the securities declared void yet they do not seem to challenge the underlying debt. While the applicants seek the interlocutory injunction so as to protect themselves against injury by violation of their property rights for which I have already found they could be adequately compensated in damages if the uncertainty were resolved in their favour at the trial, the applicants' need for such protection must be weighed against the corresponding need of the 1st respondent to be protected against injury resulting from being prevented from exercising its own legal rights in seeking to recover a loan that has been outstanding for over ten years. Having done so, I find that the balance of convenience is in favour of the respondents. Moreover, the receivership was terminated by order of court and the applicants already have caveats in place. For those reasons the application is dismissed with costs in the cause.

Delivered electronically this 14th day of September, 2022 ……Stephen Mubiru……..

Stephen Mubiru
Judge,
14th September, 2022.