

CIVIL APPEAL NO.63/07

**CORAM:**

**HON. LADY JUSTICE LE.M. MUKASA-KIKONYOGO, DCJ.**

**HON MR JUSTICE S. G. ENG WA U, JA.**

**HON. LADY JUSTICE C.K.BYAMUGISH A, JA.**

BETWEEN

AGNES BAINOMUGISHA..... APPELLANT

AND

DFCU LTD.....RESPONDENT

*[Appeal from the ruling and orders of the High Court of Uganda-Commercial Division sitting at Kampala (Engonda-Ntende J)*

*dated 19<sup>th</sup> September 2007 in Miscellaneous Application No.435/07 arising out of HCCS No. 518/07*

JUDGMENT OF BYAMUGISHA, JA.

This is an appeal against the decision of Engonda-Ntende J. wherein the appellant's application for a temporary injunction was rejected.

The facts that led to the filing of the application are the following.

The appellant and her husband applied for a loan from the respondent through their company Bainebitamazire Mixed Farm Ltd.

The appellant and her husband are directors in the company. The appellant is the company secretary and her husband is the Managing Director.

In 2002 the company obtained a loan and in order to secure the repayment of the said loan property comprised in Plot No. 15 Kashari Block 18 Folio 8 Volume 2514 Mbarara (hereinafter called the suit property) was offered as one of the securities. The property in question is registered in the names of the appellant's husband.

The company passed a resolution authorizing it to borrow money and to use the securities mentioned therein. The resolution was signed by the appellant as Secretary/ Director and her husband as MD. She also signed a personal guarantee.

The company defaulted in the payment of the loan and the respondent through one Agaba Alex Micheal, a Receiver, advertised the suit property for sale in one of the local newspapers.

The appellant then filed HCCS No.836/06 seeking to stop the respondent from selling the suit property among other reliefs.

On 22<sup>nd</sup> June 2007 she filed Chamber Summons under the provisions of **Order** 41 rule 1(a) of the *Civil Procedure Rules* seeking an order of a temporary injunction against the respondent, its agents or assignees to restrain them from selling,

alienating, trespassing or in any way trespassing on the suit property until the hearing and the determination of the main suit..

The Chamber Summons were supported by her affidavit and opposed by the respondent which filed an affidavit in reply.

Nine grounds or reasons were formulated in support of the application. These were:

1. That the applicant has for the last 24 years been married to Mr. Bitamazire Frank Bainomugisha, the proprietor of the suit land where both have earned a living from the suit property which the respondent seeks to sale.
2. That the above mentioned land was mortgaged by the applicant's husband illegally without her knowledge, consent and approval.
3. That the respondent has proceeded to sell the applicant's property despite the applicant having lodged a caveat.
4. That the action of the respondent/ defendant is in violation of Article 237 of the 1995 Constitution of Uganda and section 39 of the Land Act (Cap 227).
5. That if the applicant's property is sold and the family is evicted from the land she will suffer irreparable damage including loss of income.
6. That the threat of evicting the plaintiff and her family from their land is real and imminent as the defendant is in final process of selling the applicant's matrimonial home and land on the basis of an illegal mortgage.
7. That if the application is not granted the eviction and sale will go ahead.
8. That the main suit and the substantive application have a great likelihood of success and if the application is not granted they will be rendered nugatory.
9. That it is just and equitable to maintain the *status quo* and on the balance of convenience to grant the application.

The application was heard and dismissed- hence the instant appeal.

10. The memorandum of appeal filed on behalf of the appellant has three grounds:

1. *The learned trial judge erred in law and in fact when he found that the appellant had not made out a prima facie case for grant of a temporary injunction.*
2. *The learned trial judge erred in law and in fact when he based his 10 decision on matters to be determined at the hearing of the main suit and thus pre-judged the case and came to the wrong conclusion.*
3. *The learned trial judge erred when he did not decide the application for injunction on a balance of convenience.*

When the appeal came before us for final disposal, Mr. Kakuru, learned counsel for the appellant, argued all the three grounds of appeal together. I shall try to handle them in a similar manner.

Mr. Kakuru submitted that the learned trial judge erred when he held that there was no *prima facie* case. He pointed out that the transaction was entered into in 2002 before the amendment of the Land Act in 2004. It was counsel's submission that *section 39* of the Land Act required prior written consent of the spouse before any transactions involving family land is entered into.

Learned counsel argued that the respondent had stated that consent was implied or deemed merely because the appellant signed all the documents. He, however, , contended that the issue at hand is not the signing of the documents but what kind of consent was required under *section 39* before the section was amended whose provision was express.

He cited to us a decision of the Supreme Court in the case of *Geoffrey Gatete & Angela Maria Nakigonya v William Kyobe SCCA No. 7/05* which discusses what amounts to deeming in the eyes of the law.

He asked to allow the appeal with costs.

In reply, Ms Sebatindira, learned counsel for the respondent, opposed the appeal and supported the learned trial judge's decision. She submitted that no *prima facie* case was made out as no consent was required. She claimed that the

documents on court record constitute awareness on the part of the appellant.

She invited us to dismiss the appeal

Section 39 of the Land Act which Mr Kafuru is relying on, provided as follows:

*(1) No person shall-*

*a) sell, exchange, transfer, pledge, mortgage or lease any land;*

*(b) enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any kind; or*

(c) give away any land *inter vivos*, or enter into any transaction in respect of land-

(i) in the case of land on which the person ordinarily resides with his or spouse and from which they derive their sustenance, except with the prior written consent of the spouse;"

The amendments that were introduced in 2004 deleted the word "written" and introduced a provision which states that the consent required under the section "shall be in the manner prescribed by regulations made under this Act".

The said regulations were made as S.I. No.43/04. My understanding of the provisions of the section I have reproduced was to impose restrictions on spouses from dealing with family land in the manner described in the section without the consent of the other spouse. Consent also involves knowledge. However I do not think the consent under the section applies to a company even if the company is owned by the family members. The framers of the section did not envisage a company having a spouse or owning family property/land. In my view the section can only apply in circumstances where one spouse is going to deal with family property/land with third parties.

Such spouse would require consent of the other spouse in accordance with the regulations.

The transaction now under dispute was entered into by a company called Bainebitamazire Mixed Farm Ltd. The principal officials of the company who signed all the documents were the appellant and her husband as Director/Secretary and Managing Director respectively.

Normally company matters are conducted through the officials of that company since a company is a legal fiction.

The appellant and her husband convened a board meeting of the company on 3<sup>rd</sup> July 2002 and passed a resolution authorizing the company to borrow money and to offer the suit property as one of the securities.

The same resolution authorized the Managing Director and another Director or Secretary to execute the securities and all other relevant documents for and on behalf of the company.

On the strength of this resolution the appellant and her husband signed the mortgage deed, the debenture and a personal guarantee.

As the learned judge rightly observed, the appellant was the 'mind' of the company that mortgaged the suit property together with her husband. Both of them ought to have sought consent on behalf of the company if any consent was required.

Contrary to the allegations made by the appellant in the Chamber Summons and the supporting affidavit that it was her husband who mortgaged the suit property without her knowledge and consent, the evidence on record does not show that the husband mortgaged the suit property or that she did not know about the transaction.

All that the husband did was to grant powers of attorney as the registered proprietor of the suit property to the company to mortgage the same to the respondent as security for the loan. Granting powers of attorney is not mentioned in the section as requiring consent of the spouse.

In order for the appellant to succeed in her application she filed in the High Court she had to plead and show *prima facie* that she is a spouse of the mortgagor whose consent was required under *section 39* of the Land Act. As already pointed out the mortgagor was Bainebitamazire Mixed Farm Ltd and I doubt whether the appellant is its spouse for purposes of the section. This is a matter that will be determined at the trial.

The decision of *Geoffrey Gatete & another v Kyobe* which Mr Kakuru cited does not apply to the facts of this appeal.

In the result, I cannot fault the learned trial judge for finding that no *prima facie* case had been made out for the grant of a temporary order of injunction.

Her appeal to this court ought to fail and I would dismiss it with costs to the respondent both here and in the lower court.

Dated at Kampala this 1<sup>st</sup> day of December 2008.

C.K.Byamugisha

JUSTICE OF APPEAL

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.63 OF 2007

CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ.

HON. JUSTICE S.G. ENGWAU, JA.

HON. JUSTICE C.K..BYAMUGISHA, JA.

AGNES BAINOMUGISHA.....APPELLANT

VERSUS

DFCU LTD.....RESPONDENT

*[Appeal from the ruling and orders of the High Court of Uganda Commercial Division sitting at Kampala (Egonda-Ntende J)*

*[Dated 19<sup>th</sup> September 2007 in Miscellaneous Application No. 435/2007 arising out of HCCS. No. 518/2007]*

JUDGMENT OF HON. JUSTICE L.E.M. MUKASA- KIKONYOGO, DCJ.

I had the advantage of reading in draft the judgment prepared by Byamugisha, JA and I agree with her that the appeal is without merit and must fail.

The learned justice properly considered the three issues raised in this appeal and came to the right conclusion.

I do not have much to add but comment on some matters which I feel need emphasis.

The learned judge gave a clear background of the matter so I need not reproduce it.

As the record stands I agree with the lead judgment, that we cannot fault the learned trial judge in his finding. He was justified to come to the decision in his ruling.

He rightly ruled that there was no prima facie case to justify grant of the injunction sought by the appellant. The appellant having signed a personal guarantee for the loan and the debentures could not turn round and deny knowledge of the loan. Further, as rightly pointed out by counsel for the respondent the appellant signed the resolution both as director and secretary. There were no triable issues. The provisions of S. 39 of the Amended Land Act were complied with. The circumstances in which the transaction was carried out did not necessitate consent of the appellant. Both the appellant and her husband, called a board meeting of their Company and passed a resolution allowing the Company to borrow money and offer suit property as one of the securities.



With regard to the remaining issues I concur with the conclusions reached by Byamugisha JA in the lead judgment.

Since Engwau, JA also agrees, this appeal is dismissed with costs in this Court and High Court. The judgment and orders of the High Court are upheld.

Dated at Kampala this.1<sup>st</sup> day ofDecember 2008.

L.E.M Mukasa Kikonyogo

Deputy chief Justice

CORAM: HON. JUSTICE. L.E.M. MUKASA-KIKONYOGO, DCJ

HON. JUSTICE S.G. ENGWAU, JA

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*(Appeal against the ruling and orders of the High court of Uganda - Commercial Division sitting at Kampala (Egonda-Ntende,J.)*

*Dated 19<sup>th</sup> September, 2007 in Miscellaneous Application No.435 of 2007 arising out of H.c.c.s No.518 of 2007)*

JUDGMENT OF ENGWAU, JA.

I had the benefit of reading in draft the lead judgment prepared by my learned sister, Byamugisha JA and I agree with her reasons and conclusion that this appeal must fail for lack of merit.

I have nothing more useful to add.

Dated at Kampala this 1<sup>ST</sup> Day of December 2008.

S.G Engwau

JUSTICE OF APPEAL