THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 0347 OF 2019

(Coram: Cheborion Barishaki, Stephen Musota & Christopher Madrama, JJA)

1. BISANGWA KASIMBA JOSEPHAT

2. BISONS CONSULINTERNATIONAL LTD::::::::::::::::::::::::::APPELLANTS

VERSUS

DIAMOND TRUST BANK UGANDA LTD::::::::::::::::::::::::::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Wabwire, J. dated the 22nd day of November, 2019 in Miscellaneous Application No. 0388 of 2019 arising from Civil Suit No. 429 of 2019)

JUDGMENT OF CHEBORION BARISHAKI, JA

This appeal was preferred against the decision of the High Court rendered in Miscellaneous Application No. 0388 of 2019, an application for a temporary injunction filed by the appellants to stay the status quo pending determination of Civil Suit No. 429 of 2019, which Wabwire, J. allowed on condition that the appellants would deposit Shs. 550,000,000/= with the respondent within 30 days from the date of the decision, otherwise, the application would be dismissed.

In 2016, the 2nd appellant, a company in which the 1st appellant was Managing Director made a successful bid to Kampala Capital City Authority by which it was contracted to carry out certain construction works. KCCA required the 2nd appellant to execute performance bonds for due execution of the said works. The 2nd appellant approached the respondent over the performance bonds. By agreement dated 9th July, 2016, the respondent issued a performance bond for Shs. 429,376,441/=. By agreement dated 10th June, 2016, the respondent issued another performance bond for Ug. Shs. 858,752,883/=. The performance bonds were advanced on security of certain properties (the mortgage properties) belonging to the 1st appellant.

On 17th October, 2018, KCCA made a demand on the performance bonds, requiring the respondent to pay to it Ug. Shs. 1,164,726,535/=. The respondent duly honoured its obligations and paid the said sums as requested. In the period after honoring its obligations to KCCA, it appears the respondent decided to have recourse to its remedies under the mortgage with the appellants, by proceeding to sell the mortgaged properties. The appellants disputed the amount the respondent claimed to be owing under the credit facility. The appellants also alleged that the respondent had acted in breach of the law in the method it adopted to sell the mortgaged properties.

As a result, the appellants instituted Civil Suit No. 429 of 2019 in the High Court to challenge the impugned methods of the respondent's dealing with the mortgaged properties. This suit is pending determination in the High Court. As an interlocutory measure, they sought a temporary injunction to restrain the

respondent from selling the mortgaged properties until the main suit was disposed of. As stated earlier, the Court granted a conditional temporary injunction which would only come into effect on the appellants paying Ug. Shs. 550,000,000/= to the respondent within 30 days from the date of the decision made on 22nd November, 2019. However only Ug. Shs 500,000,000/= was paid instead of Ug. Shs 550,000,000/=.

The appellants opted to challenge the conditional order of temporary injunction by appealing to this Court. The grounds of appeal are as follows:

(i) The learned trial Judge erred in law and fact when he held that the applicants admitted a debt of Ug. Shs. 1,100,000,000/= (One Billion One Hundred Millions Only) as owing to the respondent;

(ii) The learned trial Judge erred in law and failed to exercise discretion judiciously, when he ordered the applicants to deposit Ug. Shs. 550,000,000/= (Uganda Shillings Five Hundred Fifty Million) within 30 days from the date of the ruling as a condition for the temporary injunction to be granted;

(iii) The learned trial Judge erred in law and fact, when, after finding that the respondents had failed to follow the mortgage regulations and or other powers, went ahead to invoke the same regulations to require the applicants to deposit 50% of Ug. Shs. 1,100,000,000/= (One Billion One Hundred Millions Only) without establishment of the "forced sale value" of the mortgaged property.

The appellants prayed this Court to resolve all the grounds of appeal in their favour, set aside the orders of the learned trial Judge and substitute instead an order granting the temporary injunction sought by the appellant in the lower Court, unconditionally with costs in the main cause.

The respondent opposed the appeal.

Representation

At the hearing, Mr. Bwesigye Enock, learned counsel appeared for the appellants. Mr. Steven Zimula, learned counsel appeared for the respondent. The parties filed written submissions in support of their respective cases and the same have been considered in this judgment.

Appellants' submissions

Counsel for the appellant proposed to argue grounds 2 and 3 concurrently and thereafter ground 1 independently.

Counsel submitted that the gist of grounds 2 and 3 is that the learned trial Judge erred when he reached his decision without taking into account instances of the respondent's failure to comply with the law in dealing with the mortgaged properties. First, the respondent had refused to serve a statutory notice of their intention to sell the mortgaged property. Secondly, the respondent had not ascertained the value of the mortgaged property, that is, the current market value and the forced sale value, as required by the Regulation 11 (2) of the Mortgage Regulations, 2012. At the time of the application in the lower Court, the respondent had last carried out valuation of the property 5 years earlier.

Counsel submitted that the evidence indicated that the respondents had not come to Court with clean hands and thus the Court should not have decided in their favour.

Counsel further submitted that in directing that 30% or 50% of the disputed claim in mortgage cases be deposited in Court, if based on the Mortgage Regulations, then such regulations constitute a fetter or limitation on the constitutional right to a fair hearing as enshrined in Article 28 and Article 44 (c) of the 1995 Constitution. Whereas the highlighted direction was approved in the decision of this Court in **Ganafa Peter vs. DFCU Bank Ltd, Civil Application No. 0064 of 2016**, counsel for the appellants asked this Court to depart from the reasoning in that decision and instead follow the ratio decidendi of the Constitutional Court in **Fuelex (U) Ltd vs. URA, Constitutional Petition No. 13 of 2009** where the Court stated that laws that require a person to deposit monies in Court before deciding a case tend to restrict access to a fair hearing. While the Fuelex decision was related to deposit of a proportion of a contested tax assessed by URA, counsel invited this Court to extend the reasoning to cases involving other similar laws, like mortgage laws. This would be justified considering that Article 21 of the Constitution enshrines the principle of equal treatment for all before the law.

In view of the above submissions, counsel prayed this Court to allow grounds 2 and 3 of the appeal.

On ground 1, counsel contended that the learned trial Judge erred in finding that the appellants admitted to being indebted to the respondent to the tune of Ug. Shs. 1,100,000,000/=. The document (annexure E3 to the respondent's affidavit at page 81 of the record) purportedly written by the applicants admitting to being indebted was an out of court document, which the appellants disputed at the trial and was superseded by their pleadings. That document E3 should, therefore, have been considered by the learned trial Judge as inadmissible and no weight should have been attached to it. Further, at trial, the respondent claimed for Ug. Shs. 1,203,749,243/= and not the amount indicated in document E3. The appellant on the other hand raised issues relating to the legality of the mortgage transaction. According to counsel, this went further to show that the due debt was disputed by the parties, and that there were triable issues for the Court's determination. Counsel relied on the decisions in **Godfrey Ssebanakitta vs. Fuelex (U) Ltd, Supreme Court Civil Appeal No. 4 of 2016** and **Omer Farming Co. Ltd vs. Rehoboth Agricultural Management Services Ltd, High Court Miscellaneous Application No. 21 of 2019** and asked Court to allow this ground, as well.

Respondent's submissions.

Counsel for the respondent argued ground 1 independently followed by grounds 2 and 3 jointly.

On ground 1, Counsel supported the learned trial Judge's findings that the appellant had admitted indebtedness to the respondent to the tune of Ug. Shs.

1,100,000,000/=. Counsel argued that the indisputable facts of the case were that the 2nd appellant had obtained credit facilities from the respondent, constituting of two performance bonds for contracts it had undertaken to perform with KCCA. The 2nd appellant had failed to carry out the contracted works leading to KCCA making a call for Shs. 1, 164,726,535/= on 18th October, 2018. On 26th October, 2018, the appellants, had through their advocates, written to the respondent proposing a repayment plan for the money which was due. Counsel for the respondent submitted that all the evidence confirmed the appellants' indebtedness, as found by the learned trial Judge. Further, that the authority of **Sebanakitta vs Fuelex (Supra)** relied on by the appellants was inapplicable to the present case. For the above reasons, counsel prayed that ground 1 of the appeal be disallowed.

On grounds 2 and 3, counsel for the respondent supported the learned trial Judge's decision to grant the conditional order for the temporary injunction on the terms that he did. He pointed out that the Mortgage Regulations, 2012 particularly Regulation 18 (5) thereof, require that 50% of the outstanding amount is paid before a defaulting mortgagor can stop or adjourn an impending sale of mortgaged property. This position was articulated in the decision of this Court in **Ganafa Peter Kisawuzi** (supra). Counsel further submitted that the appellants admitted to being indebted to the respondents. Moreover, despite their evidence otherwise, all the relevant notices were duly served and were on record. Counsel prayed that grounds 2 and 3 of the appeal be dismissed.

Resolution

I have carefully considered the submissions by counsel on either side, and the law and authorities cited in support thereof. This is a first appeal, and pursuant to Rule 30 (1) (a) of the Rules of this Court, the practice is that in determining such appeals, this Court will reappraise the evidence on record and come up with its own conclusions. See also: **Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported)** where it was stated that the first appellate court has a duty to review the evidence of the case and reconsider the materials before the trial Judge. The appellate court must then make up its mind not disregarding the judgment appealed from but carefully weighing and considering it.

After consideration of the grounds of appeal, what comes out is that there is one major question raised in this appeal, and it relates to the perceived error in exercise of discretion when the learned trial Judge granted the order of temporary injunction on the terms that he did. The appellants contend that the learned trial Judge either failed to take into account certain matters or took into account matters which he ought not to have taken into account.

The decision to grant a temporary injunction is one that is reached after exercise of a court's discretion, and is principally governed by the provisions of Order 4 Rule 1 (a) of the Civil Procedure Rules, S.I 71-1. The said provision is couched in the following words;

"ORDER XLI—TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

1. Cases in which temporary injunction may be granted.

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;

(b) ...

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 learned trial Judge was alive to the relevant principles which have been articulated in several cases which he cited in his decision, such as **Kiyimba Kaggwa vs. Katende [1985] HCB 23** and in **American Cyanamid Co vs. Ethicon Ltd [1975] 1 ALLER 504.** The principles may be summarized as follows; the decision whether to grant or refuse to grant a temporary injunction is one reached as an exercise of judicial discretion. The purpose of granting such injunction is to preserve the status quo until the main suit is disposed of. The conditions for grant of a temporary injunction, which the applicant ought to satisfy on a balance of probabilities are: 1) that there is a prima facie case to be tried in the main suit; 2) The injunction will normally not be granted unless the

applicant might otherwise suffer irreparable injury which would not be adequately compensated by award of damages; 3) If the Court is in doubt as to conditions 1 and 2, it will decide the application on a balance of convenience.

It is not uncommon for this Court to be asked to reverse a decision of a lower court resulting from exercise of discretion. In analogous cases, relating to discretion to award damages or impose a sentence, the now accepted principles are to the effect that on appeal, this Court will not interfere with exercise of discretion unless the trial Court acted on wrong principles of law. The Supreme Court in **Crown Beverages vs. Sendu Edward, Civil Appeal No. 01 of 2005** (unreported) while dealing with a similar matter, Oder, JSC stated:

> "...the principle that an appellate court will not interfere with the award of damages by a trial court [awarded in exercise of judicial discretion] unless the trial court acted upon wrong principles of law or the amount awarded is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled to..."

Similar principles have been articulated in decisions concerned with reviewing exercise of discretion while sentencing on appeal. In **Livingstone Kakooza vs. Uganda, Supreme Court Criminal Appeal No. 17 of 1993 (unreported)** it was stated inter alia, that acting on a wrong principle, or the trial Court having overlooked a material factor, would justify interference with exercise of sentencing discretion.

It must be demonstrated that the exercise of discretion relating to the grant or refusal of a temporary injunction was based on wrong principles of law; or that in reaching the decision, the court failed to take into account some material factors for the appellant Court to interfere with the exercise of discretion.

In the instant case, the appellants allege that the learned trial Judge failed to take into account some material factors. The learned trial Judge is faulted for not considering evidence that the respondent had refused to serve a statutory notice of their intention to sell the mortgaged property. Further, that the learned trial Judge failed to consider evidence that the respondent had ignored to ascertain the value of the mortgaged property, that is, the current market value and the forced sale value, as required by the Regulation 11 (2) of the Mortgage Regulations, 2012. At the time of the application in the lower Court, the respondent had last carried out valuation of the property at least 5 years earlier. On the other hand, the respondent's case is that the decision of the learned trial Judge was justified considering the circumstances of the case which set out clear evidence that the appellants were indebted to the respondent.

I have considered the arguments for the appellants, which in my view, relate to the main suit as opposed to the application for temporary injunction with which this appeal is concerned. In determining the application for temporary injunction, the learned trial Judge considered all the relevant materials before him which included evidence that the appellants had earlier acknowledged their indebtedness and had proposed a repayment plan to cover the same. Annexture E3 to the respondent's affidavit is a letter of 26th October, 2018, written to the

respondent by the 1st appellant on behalf of the 2nd appellant sets out details of the repayment plan. In the said document, the appellants raise concerns that the respondent intended to sale the mortgage properties below their market value. They wrote:

> "First and foremost the 5 properties with you were last valued about 5 years ago and even at that time, they were grossly undervalued and the valuation report needs to be updated to march (sic) with the inflationary rate and the actual valuation for a more realist (sic) value to both the owner of the properties and the bank."

Notwithstanding the above reservations, the appellants went on to reassure the respondent that they would source funds so as to clear their indebtedness to the respondent. The learned trial Judge considered all this evidence and found that the case against the appellants was overwhelming, and that justice would best be served by requiring the appellants to deposit part of the disputed monies, to the tune of Ug. Shs. 550,000,000/= within 30 days or the application would be dismissed. The course adopted by the learned trial Judge was justified considering the serious risk of adoption of dilatory tactics by the appellants, if he had granted an unconditional order of temporary injunction. It can hardly be said that the conditional order was made in disregard of any material factor.

Issues relating to valuation of the suit property as raised in the appeal, were irrelevant in determining the application for temporary injunction. They were only relevant to the main suit where the appellants could lead evidence to prove

that the respondent had sold the mortgaged properties, and in so doing, violated provisions of the law on valuation before sale. The trial Court could, on determining the point in their favour might have awarded remedies.

I have not been persuaded to apply the dictum in **Constitutional Petition No.13 of 2009, Fuelex vs. Uganda Revenue Authority** which is clearly inapplicable to the circumstances of this case. I also find it unnecessary to express an opinion on the constitutionality of the Mortgage Regulations, 2012 in so far as they allegedly require a Mortgagor to pay a percentage of the money he/she owes to a Mortgagee, as a condition for adjourning an impending sale of the mortgaged property.

I find no reason to interfere with the learned trial Judge's exercise of discretion in granting a conditional order of temporary injunction on the terms he did because it was not unreasonable in the circumstances of the case.

Since a substantial part of the Conditional Order was fulfilled with the payment of Shs. 500,000,000/= by the appellants, it would be just, fair and reasonable for the appellant to pay the Shs. 50,000,000/= being the balance of shs. 550,000,000 which was ordered by the Judge to be paid as a condition precedent to the injunction remaining effective pending the disposal of the suit after hearing so that the injunction is not lifted.

In the result, I would dismiss the appeal, uphold the decision of the learned trial Judge and order that the respondent be paid the costs of this appeal and those in the Court below.

Since both Musota JA and Madrama JA agree, this appeal is dismissed with costs to the respondent in this court and in the court below.

I would so order.

Dated at Kampala this ....23rd....day of ....Sept.... 2021

Cheborion Barishaki

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 347 OF 2019

(Arising from Misc. Application No. 0388 of 2019)

1. BISANGWA KASIMBA JOSEPHAT
2. BISONS CONSULT INTERNATIONAL LTD :::::: APPELLANT

VERSUS

DIAMOND TRUST BANK UGANDA LTD :::::::::::: RESPONDENT

CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment of my brother Hon. Justice Cheborion Barishaki, JA.

I agree with him that the appeal is void of merit and ought to be dismissed with costs in this court and the court below.

Dated this 23rd day of Sept 2021

Stephen Musota

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: CHEBORION, MUSOTA AND MADRAMA, JJA)

CIVIL APPEAL NO 0347 OF 2019

1. BISANGWA KASIMBA JOSEPHAT}
2. BISONS CONSULT INTERNATIONAL LTD} ..... APPELLANTS

VERSUS

DIAMOND TRUST BANK UGANDA LTD} ..... RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Wabwire J, dated the 22nd day of November, 2019 in Miscellaneous Application No. 0388 of 2019 arising from Civil Suit No 429 of 2019)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Cheborion Barishaki, JA.

I agree with him that the appeal has no merit and should fail. I further concur with the orders he has proposed and have nothing useful to add.

Dated at Kampala the 23rd day of Sept 2021

Christopher Madrama

Justice of Appeal