

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 101 OF 2023

(Arising from Civil Appeal N0.0093/2023)

1. KARE DISTRIBUTION LTD
2. KAREGEYA GEOFFREY.....APPLICANTS

VERSUS

NCBA BANK UGANDA LIMITED.....RESPONDENT

CORAM: HON. MR. JUSTICE OSCAR JOHN KIHKA, JA

(Sitting as a Single Justice)

RULING OF COURT

This application was brought under Rule 2 (2), Rule 6(2) (b), 43(1) and 44(1) of the Judicature (Court of Appeal Rules) Directions SI 13-10 seeking for orders that;

1. An Interim Order of Injunction be issued against the Respondent, her agents/workers/servants restraining them from selling, alienating or dealing in any way with suit properties vide land comprised in Kibuga Block 3 Plots 749 and 751 at Makerere, Kawempe Division, Kampala with developments thereon and the motor vehicles vide;

- i) UAX 073Q EICHER Truck 10-75, engine E411CDFE031684, Chassis number MC2A5FRC6FE316382.
- ii) UAX 583Q EICHER Truck 10-75, Engine number E411CDFE032229, Chassis number MC2A5FRC7E316682.
- iii) UAX 586Q EICHER Truck 10-75, Engine number 41D841583, Chassis number MC223FRCOE1290829.
- iv) UAX 586Q EICHER Truck 10-75 Engine number E411CDFE032226, Chassis number MC2A5FRC2FE316685
- v) UAX 220Q EICHER Truck 10-75, Engine number E411CDFE031685, Chassis MC2A5FRC9FE316375.
- vi) UAX 587Q EICHER Truck 10-75, Engine number E411CDFE031689, Chassis number MC2F5RC8FE316383.

- vii) UAX 077Q EICHER Truck 10-75, Engine number E411CDFE031680, Chassis number MC2A5FRC7FE316374.
- viii) UAX 319C FORD RANGER D/cabin 2.2D, Engine number PF2HPFK52040, Chassis number 6FPPXXMJ2PFK52040,

until hearing and determination of the substantive Civil Application for an order of a temporary injunction pending before this court.

2. Costs of this application be provided for.

Background

The background to this application has been quite difficult to ascertain. This is owing to the fact that Counsel for the Applicant in drafting the pleadings chose not to appraise this court with all the relevant facts out of which this application arose. It did not help matters that Counsel for the Respondent also left out quite a bit of information as well.

That notwithstanding, after a thorough examination of the attachments to the affidavits, and doing the best I could, determined the background to this application to be the following;

The 1st Applicant, it appears obtained three loan facilities from the then Commercial Bank of Africa Uganda Limited. The facilities availed to the Applicant were the following;

- A. MG178100628 for the loan of UGX 3,800,000,000/= payable over a period of 84 months.
- B. MG1708100629 for the loan of UGX 1,400,000,000/= payable over a period of 24 months, and
- C. MG1731700773 for the loan of UGX 230,000,000/= for 24 months.

The 1st Applicant also obtained a bank overdraft to a tune of UGX. 800,000,000/= which brought the Applicants' total obligation to UGX 6,230,000,000/= as the principal amount payable.

The aforementioned loans were secured by land comprised in Kibuga Block 3 Plots 749 and 751 at Makerere, Kawempe Division, Kampala with developments thereon and a number of motor vehicles.

It would appear that the Applicants defaulted on the payment of the loans which then resulted in the filing of High Court Civil Suit No. 637 of 2018 by the said Applicants. A consent judgement was entered in that suit, the terms of which, in a nut shell, the Applicants acknowledged indebtedness to the Respondent, and a payment schedule was agreed upon.

The Applicant then filed Miscellaneous Application No. 1015 of 2018 seeking to set aside the consent judgement which application was dismissed by Justice Wangutusi on the 19th day of August 2021. The Applicant being dissatisfied with the orders dismissing Miscellaneous Application No. 1015 filed Civil Appeal No. 245 of 2021 which is pending in this court.

The Applicants further filed Miscellaneous Application No. 1670 of 2022 in the High Court Commercial Division, arising out of High Court Civil Suit No. 637 of 2018 wherein they sought to prove to the court that they had paid all the outstanding loan obligations. The Respondents in response filed Miscellaneous Application No. 0135 of 2023 wherein they sought to have Miscellaneous Application No. 1670 of 2022 struck out/dismissed for being vexatious, an abuse of court process and for failure to disclose a cause of action.

Hon. Justice Mubiru on the 15th of February 2023 struck out Miscellaneous Application No. 1670 of 2022. It is against that decision that the Applicants then filed Civil Appeal No. 93 of 2023 in this court which is pending determination.

This application for an interim order of an injunction thus arises from Civil Appeal No. 93 of 2023. There is also pending in this court the substantive application for an injunction.

The grounds of the application, as stated in the Notice of Motion and affidavit in support of the application sworn by **Karegeya Geoffrey** the 2nd Applicant on the 20th of March 2023 are briefly as follows;

1. *The applicants obtained the suit loans from Commercial Bank of Africa Uganda Limited which later in 2020 sold her assets and liabilities to NC Bank Limited that changed her name to NCBA Bank Limited that changed her name to NCBA Bank Uganda Limited (the Respondent herein).*
2. *The applicants fully paid off the suit loans to zero balances before Commercial Bank of Africa Uganda Limited sold off her assets and liabilities to the Respondent bank but the Respondent continues to hold the suit properties which were pledged as securities to illegally clog the applicant's right of redemption.*
3. *The applicants applied to the lower court to compel the Respondent to release the suit properties but the proceedings were struck out without being heard on merit.*
4. *The applicants have since filed an appeal vide Civil Appeal No. 0093 of 2023 in this court which appeal is pending hearing before this court.*
5. *The applicants have also filed a substantive application for Temporary Injunction vide Civil application No. 100 of 2023 which is pending hearing before this honorable court.*
6. *The Respondent and his agents, employees, servants or persons acting on her behalf and instructions are threatening to alienate and dispose the suit properties to third parties before the underlying substantive application and the appeal are heard and determined.*

7. The Respondent disposes off the suit properties to create third parties' interests, it will occasion grave miscarriage of justice since the main application and subsequently the underlying appeal will have been rendered nugatory to the detriment of the applicants.

8. That the suit properties are in eminent danger of being alienated and disposed of by sale to third parties if the Respondent is not restrained from doing so which will adversely affect the applicants since their substantive application for Temporary Injunction will be rendered nugatory and of no relevance.

9. That the applicants' substantive application and the underlying appeal have high chances of success and shall both be rendered nugatory if this application for temporary injunction is not granted.

10. That the applicants will suffer substantial loss/irreparable injury if this application is not granted.

11. That it is in the interest of justice that this application be granted to maintain the status quo of the suit properties until the applicants' main application is heard and determined.

The Respondent filed an affidavit in reply deposed by **Erinah P. Nantege**, opposing the application and briefly stated that;

1. That the Respondent Files Misc. Application No.0135 of 2023 seeking an order to strike out and /or dismiss Misc. Application No.1670 of 2022 for being frivolous, vexatious and an abuse of Court process, and for failure to disclose a cause of action.

2. That trial Judge, the Hon. Justice Stephen Mubiru, heard Misc. Application No.0135 of 2023 on 15th February 2023 and struck out Misc. Application No. 1670 of 2022 with costs to the Respondent herein.

3. That there is no basis for seeking an interim order of injunction on property which was not the subject matter in Misc. Application No. 0135 of 2023.

4. That there was no positive order issued by the trial Judge that is capable of being enjoined.

5. That the Applicants have never been cleared their loan obligations with the Respondent.

6. That to-date, outstanding loan sums in excess of Ug. Shs. 8,000,000,000/= are still outstanding and have never been cleared by the Applicants.

7. That the Application is a clear abuse of Court process as the Applicants are fully aware that their loan obligations to the Respondent have never been cleared but they are falsely alleging that they cleared the same.

8. That as can clearly be noted under paragraph 4 of the Affidavit in support of Motion on Notice, the properties in respect of which the Applicants are seeking an injunction are mortgage properties.

9. That the Applicants have not complied with Regulation 13(1) of the Mortgage Regulations, 2012 which requires payment of security deposit 30%, of the outstanding amount, in a case like this where they are seeking interim relief from Court by way of stoppage of sell of the mortgage property.

10. That the Applicants application is a disguised application for stay of execution of a Decree of the High Court in High Court Civil Suit No. 637 of 2018. The trial Judge dismissed the 1st Applicant's application seeking to set aside the Consent Judgment in High Court Civil Suit No. 637 of 2018 and against which order the 1st Applicant preferred a separate appeal before this Honourable Court, Civil Appeal NO. 245 of 2021, which is still pending before this Honorable Court.

It will be noted from the above that the 2nd Applicant in his affidavit in support, deliberately left out vital information relating to High Court Civil Suit No. 637 of 2018 which is the origin of the matter now before this Court. The Respondent on the other hand only made casual reference to a Consent Judgement that had been entered in the said High Court Civil Suit No. 637 of 2018. The particulars as to when the Consent Judgement was entered and the terms therein are not provided by the Respondent.

It was the Applicants in their affidavit in rejoinder sworn by the 2nd Applicant on the 11th day of April 2023, who then shed some light on the matter.

Appearances

When this application came up for hearing, **Counsel Hillary Kaburisa** appeared for the Applicants, while **Counsel James Kyazze** appeared for the Respondents. The 2nd Applicant was in court while the Respondent was unrepresented. Both parties filed written submissions which I have carefully considered in making this decision.

Consideration of the application

I have carefully considered the Notice Motion, affidavits in support and in opposition, and submissions of both counsel and the authorities cited therein.

There is a preliminary point that has been raised by Counsel for the Respondent which ought to be addressed first before diving into the merits of this application.

It has been submitted that the Applicants cannot seek an interim order of injunction on property which was not the subject matter in Misc. Application No. 0135 of 2023.

This application seeks to injunct the sale of land comprised in Kibuga Block 3 Plots 749 and 751 at Makerere, Kawempe Division, Kampala with developments thereon and a number of motor vehicles. However, it is quite clear from the Memorandum of Appeal, attached as annexure 26 of the Applicants' affidavit in support, that the subject matter of Civil Appeal 093 of 2023 out of which this application arises does not relate to the sale of the properties.

The prayer contained in the Memorandum of Appeal reads as follows;

“WHEREFORE the appellants pray that this appeal be allowed, ruling and orders of the trial court be set aside, Misc. Application No. 1670 of 2023 and the under lying one MA No.1758 of 2022 be reinstated and heard on merits before another judicial officer, the respondent pays costs of the appeal in this court and the court below”

The pending appeal is about the re-instatement of an application that had been dismissed. The application in question, Misc. Application No. 1670 of 2023 appears to have been designed to side step a consent judgement that had been entered in High Court Civil Suit No. 637 of 2018.

As has been stated before, the Applicant had previously filed Miscellaneous Application No. 1015 of 2018 seeking to set aside the consent judgement which application was dismissed by Justice Wangutusi on the 19th day of August 2021. The Applicant being dissatisfied with the orders dismissing Miscellaneous Application No. 1015 filed Civil Appeal No. 245 of 2021 which is pending in this court.

The Applicants, and I dare add their Counsel, appear to have deliberately left out the very important aspect of the Consent Judgement in High Court Civil Suit No. 637 of 2018 as a back drop to the present application. This borders on deceitful conduct on the part of the Applicants and their advocate in an attempt to mislead this court. It is no wonder that this court found it extremely hard to get the proper background leading to the instant application.

This application, in my view, is a clear example of abuse of court process and as such should not, and indeed cannot be entertained.

I agree with the submissions of Counsel for the Respondent that the properties sought to be protected were not a subject of Misc. Application 0135 of 2023, which is also the subject of Civil Appeal No. 93 of 2023.

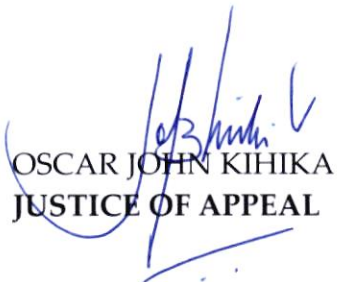
Before I leave this matter, I must address one point. Advocates that appear before the courts of judicature must know that they are first and foremost officers of the court. Their role is to assist the Court in arriving at a just decision. Counsel for the Applicants, in the instant matter, has failed in that duty. I would seriously caution him and provide counsel that such conduct ought not to be repeated going forward.

Ordinarily, in matter such as this, the Court is inclined to have the costs of the application abide the result of the substantive application or even the appeal. However, in the instant case I will award costs given the unsavoury conduct of the Applicants and their Counsel.

I therefore dismiss this application with costs to the Respondent. The Applicant is to bear 50% of the costs as is the advocate on record.

I so order

Dated this.....13th..... day ofApril.....2023


OSCAR JOHN KIHKA
JUSTICE OF APPEAL