

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL MISCELLANEOUS APPLICATION NO.12 OF 2023
Arising from Civil Application no.14 OF 2023
(arising from Civil Appeal No. 007 of 2023)

SUMMIT PROJEKT LIMITED

..... **APPLICANT**

VS

STANDARD CHARTERED BANK(U) LIMITED
RESPONDENT

RULING BY CHRISTOPHER GASHIRABAKE, JA.
(SINGLE JUSTICE)

This application was brought under Rules 2(2), 6(2) (b), 43 and 44 of the Judicature (Court of Appeal Rules) Directions, SI No. 13-10. The applicant seeks an interim order of injunction against the respondent to:

- 5 a) Maintain the status quo and restrain the respondent and any other persons acting on their behalf or claiming interest through them, from continuing to advertise for sale, selling, disposing off, auctioning, taking possession of, or taking any action likely to alienate or interfere with the applicant's interest in property comprised in *Mengo Block 197 plot 505 kitetika, LRV 2274 Folio 4 plot 12 Bazalabusa Drive Kampala, LRV 2273 Folio 23 Plot 1B Mbuya Road Kampala, LRV 392 Folio 14 plot 1084 block 269 Lubowa estate,*
- 10 *Kyadondo Block 237 Plot 517 Mutungo and Luzira, Kyadondo Block 243*



plot 2383 Luzira & Kyadondo Block 243 plot 2382, until the disposal of the substantive application for temporary injunction pending in this court.

b) Provide for costs of this application .

15 **REPRESENTATION**

At the hearing, Counsel Joseph Kyazze and Felix Ampaire appeared for the applicant. Mr. David Mischereko, Director of the applicant was present. Counsel Micheal Mafabi appeared for the respondent. There was no representative of the respondent company.

20 **GROUND**

The grounds of the application are set out in the notice of motion and the affidavit in support sworn by Mr. Mischereko David, one of the Directors of the applicant company.

The grounds are that:

- 25 a) the applicant and the respondent executed credit facility agreements which were secured by the applicant's properties described above.
- b) The applicant challenged its liability on ground of breach of contract by the respondent and sued in High Court Civil Suit No. 392 of 2018(commercial Division) seeking orders that mortgaged properties be released.
- 30 c) The applicant was unsuccessful and has appealed.
- d) He avers that the respondent has started the process of foreclosure on the mortgaged properties by advertising the properties for sell before the substantive application and the appeal are determined.
- e) The respondent opposed the application through an affidavit in reply sworn
- 35 by Richard Ssuna, Manager Special Assets Management in the respondent Bank. He contends that the application is in violation of the Mortgage

Regulations which compel an applicant who seeks a stoppage or adjournment of sale to first deposit 30% of the forced sale value of the mortgaged properties or 30% of the outstanding loan amount. The respondent admits that it advertised the mortgaged properties for sale by public auction in exercise of the rights of a mortgagee to foreclose on the securities on grounds of persistent default by the mortgagor. A copy of the advertisement was annexed as B1 to B5. The respondent stated that the application had no merit.

Consideration by Court

Rule 6(2)(b) of the Judicature (Court of Appeal Rules) Directions, provides that the . . . Court may:

“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”

The grounds for grant of interim order of injunction have been considered in various cases. *See Hwang Sung Industries Ltd Vs Tajdin Hussein & 2 others SCCA 19 of 2008, Hon. Theodore Ssekikubo & others Vs the Attorney General & others SCCCA 004 of 2014.* The grounds are:

1. The subsistence of a competent notice of appeal
2. The existence of a substantive application for injunction pending determination by the court.
3. Proof of an eminent threat of execution/alienation.

In applications grounded on mortgages, court has to determine the applicability of the requirement for deposit of 30% of the forced sale value or outstanding debt whichever is higher. I will start with this question because the respondent averred in paragraph 7 of the affidavit in reply, that court cannot invoke its equitable

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jurisdiction to grant an interim order stopping or adjourning a sale when the applicant has not complied with the law on deposit of 30%. The respondent contended that the amount outstanding is Ugx. 6, 642,167,528/= and USD 211, 498.17.

The above condition is drawn from Regulation 13(1) of the Mortgage Regulations 2014 which provides that:

“Adjournment or stoppage of sale

1. The court may on application of the mortgagor, spouse and agent of the mortgagor or any other interested party and for reasonable cause, adjourn a sale by public auction to a specified date and time upon payment of a security deposit of 30% of the forced sale value of the mortgaged property or outstanding amount”

The respondent submitted while quoting the case of *Ganafa Peter Kisawuzi Vs DFCU Bank Limited, Civil Application No. 64 of 2016*, that the Court of appeal dismissed an application of a similar nature where the applicant was found in breach of regulation 13(1) above. Counsel stated that the payment was mandatory and was a condition precedent.

In their submissions in rejoinder the applicant contended that the conditional payment is not prescribed in the court of appeal rules. Counsel relied on the case of *Woodmore Energy Consultancy Limited and 3 others Vs Guaranty Trust Bank Limited CACA 270 of 2016*, which he submitted takes precedence over the Ganafa case. In this case court denied the respondent’s prayer to order deposit of 30% before granting the applicant’s prayer for an interim order. The applicant further relied on the case of *Fuelex (U) Ltd Vs URA, Constitutional Petition No. 3 of 2009* in which the Constitutional Court held that requiring a party to deposit money or security in court

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before accessing court is unconstitutional and would be a denial of the right to fair hearing enshrined in Article 28 of the 1995 Constitution of Uganda, which right is non derogable as provided in Article 44(c).

I have taken into account the evidence, cases cited and the submissions by the parties.

90 Annexure C to the affidavit in support (memorandum of appeal) shows that the applicant disputes liability and seeking orders of this court to set aside the High Court decision. In the **Ganafa case** cited by the respondent, the Justices of Appeal were handling the main application for temporary injunction and not the interim application which is subject of this ruling. Secondly, the value of the property at

95 stake was not in dispute because a valuation report was already on record and the applicant's contention was that he was not aware of the regulatory requirement. In this case, there is no valuation report of the property upon which court would apply the 30%. Secondly, liability is disputed. I am therefore in agreement with the applicant that regulation 13(1) above is not applicable to the circumstances of this

100 case.

I now turn to the conditions for grant of an interim order.

Ground One—Subsistence of a competent notice of Appeal.

I have considered the pleadings, evidence, and the submissions filed by both parties. The respondent does not dispute the subsistence of a competent notice of appeal. In

105 paragraph 3 of the affidavit in reply, the deponent states that paragraphs 1,2 and 3 of the affidavit in support are true. Paragraph 3 of the affidavit in support which the respondent concedes, and annexure B1 thereto, are proof the notice of appeal. Section 57 of the Evidence Act provides that facts admitted need not be proved, except where court at its discretion requires proof additional to the admission. In this

110 case, the notice was filed and a substantive appeal also filed. The first ground is proved.

Ground two—Pending substantive application for injunction.

In paragraph 1 and 9 of the affidavit in support, the applicant avers that there is a pending substantive application for an order of injunction. The respondent in
115 paragraph 3 of his affidavit in reply conceded to the truthfulness of paragraph 1 of the affidavit in support, but in paragraph 17 of the same affidavit he made a contradictory averment that there is no ascertainable substantive application. Section 55 of the Evidence Act provides that facts judicially noticeable need not be proved. Both the applicant and the respondent in the titles to their respective pleadings and
120 affidavits indicate that the application for interim arises from *Civil Application No. 12 of 2023*. This quoted application is formally in court records and is judicially noticeable. No further proof of its existence is necessary. The 2nd ground is proved.


Ground 3—Proof of an eminent threat of execution/alienation.

Both the applicant and the respondent agree that the mortgaged property was
125 advertised for sell. Paragraph 11 of the affidavit in support and annexure D thereto, and paragraph 6 of the affidavit in reply with annexure B1 are the advertisement for sell. The advertisement was published in daily monitor of 19th December 2022. In *Wood More Energy Consultancy Ltd & Ors Vs Guaranty Trust Bank (U) Ltd (GT Bank) Miscellaneous Application 270 of 2016*, Justice Hellen Obura, JA, held that
130 a real threat to dispose of property is established where property subject of the application is already advertised for sell. In this case the respondent in paragraph 4 of the affidavit in reply admits her intention to sell the applicant's property on account of the applicant's alleged failure to pay the debt. Ground 3 is proved.

135 The applicant has met the conditions for grant of an interim order of injunction, and
the same is granted to maintain the status quo and to prevent alienation of the
properties described above pending determination of Civil Application No. 12 of
2023.

The costs of the application shall abide the outcome of the main application.

140 Dated at Court of Appeal Kampala this ^{23rd}..... Day of February 2023

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Christopher Gashirabake
JUSTICE OF APPEAL