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**THE REPUBLIC OF UGANDA**

**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**

*(Coram: Egonda-Ntende, Cheborion, Bamugemereire, Kibeedi & Mugenyi, JJCC)*

**CONSTITUTIONAL PETITION NO.18 OF 2021**

**1. FERDSULT ENGINEERING SERVICES LTD**

10 **2. MUGISHA FERDINAND:.....PETITIONERS**

**VERSUS**

**1. THE ATTORNEY GENERAL**

**2. ABSA BANK UGANDA**

**(Formerly Barclays Bank Uganda Ltd):.....RESPONDENTS**

15

**JUDGMENT OF CHEBORION BARISHAKI, JA/JCC**

The Petitioners brought this Petition under Article 137 (1), (2), (3), (4) and (7) of the 1995 Constitution of the Republic of Uganda and Rule 3 of the Constitutional Court (Petitions and References) Rules SI No.91 of 2005.

20 The Petitioners are Plaintiffs in HCCS No.783/2020; Fersult Engineering Services Ltd and Mugisha Ferdinand V ABSA Bank Uganda formerly Barclays Bank (U) Limited which suit is pending in the High Court Commercial Division and from which they raise questions of Constitutional interpretation relating to Regulation 13 (1) of the Mortgage Regulations No.2 of 2012. The impugned Regulation requires a mortgagor, spouse, agent of the mortgagor, or any other



5 interested party to pay 30% of the forced sale value of the mortgaged property or the outstanding amount before the sale can be adjourned or stopped.

The Petitioners allege that they are aggrieved by the said Regulation because it contravenes and is inconsistent with various provisions of the Constitution in the following ways;

- 10 i. Regulation 13(1) of the Mortgage Regulations No.2 of 2012 is inconsistent with and contravenes Articles 21, 28 and 44 of the Constitution in as far as it limits and offends the Plaintiff's right to fair hearing and right to be heard;
- 15 ii. Regulation 13(1) of the Mortgage Regulations No.2 of 2012, being a product of delegated subsidiary legislation, contravenes Articles 79 of the Constitution in so far as it is ultra vires the scope of the Mortgage Act No.8 of 2009 when it introduces the requirement to pay a security deposit of the forced sale value of the mortgaged property or the outstanding amount before a sale can be stopped/adjourned by Court, and to that extent  
20 interferes with the legislative authority of Parliament.
- iii. Regulation 13(1) of the Mortgage Regulations No.2 of 2012 is inconsistent with and in contravention of Article 26 of the Constitution in so far as it offends the right to property and facilitates the taking of one's property without fair and just compensation or a proper hearing of the same;
- 25 iv. Regulation 13 of the Mortgage Regulations No.2 of 2012 is inconsistent with the right to access to justice which in itself is a tenet of the right to

5        affair hearing and is guaranteed by Articles 28, 44, 126(1) of the Constitution;

- v.    The act of the Courts or any other person or official enforcing Regulation 13(1) of the Mortgage Regulations is unconstitutional in so far as it offends Articles 21, 26, 44, 79 and 126(1) of the Constitution.

10    The Petition is supported by an affidavit sworn by Mugisha Ferdinand, the 2<sup>nd</sup> Petitioner and the Managing Director of the 1<sup>st</sup> Petitioner. The 1<sup>st</sup> Respondent filed an answer to the Petition which was supported by the affidavit deposed by Oburu Odoi Jimmy, Principal State Attorney in the 1<sup>st</sup> Respondent's Chambers dated 31<sup>st</sup> August, 2021. The 2<sup>nd</sup> Respondent also filed an answer to the Petition  
15    which was supported by the affidavit of Gerald Emuron, Legal Counsel of the 2<sup>nd</sup> Respondent's Company dated 6<sup>th</sup> August, 2021. The Petitioners filed an affidavit in rejoinder sworn by Ferdinand Mugisha and dated 20<sup>th</sup> August, 2021.

### **Background to the Petition**

The background to this Petition is that the Petitioners filed HCCS No.783 of  
20    2020; Ferdsult Engineering Services Limited V ABSA Bank, challenging the intended sale of their mortgaged property by the 2<sup>nd</sup> Respondent, on various grounds. They also filed High Court Miscellaneous Application No.816 of 2020 seeking a temporary injunction against the intended sale. The application was heard and determined by the Registrar who acting under Regulation 13(1) of the  
25    Mortgage Regulations, granted a temporary injunction stopping the sale by the 2<sup>nd</sup> Respondent on condition that the Petitioners deposited in Court 30% of the



5 outstanding loan amount claimed by the 2<sup>nd</sup> Respondent within 45 days. Aggrieved by the order of Court, the Petitioners filed High Court Miscellaneous Application No.21 of 2021 appealing against the ruling of the Registrar. The trial Judge dismissed the appeal and upheld the orders of the Registrar.

Aggrieved by the said order of the Judge, the Petitioners filed the instant Petition  
10 seeking declarations that Regulation 13(1) of the Mortgage Regulations of 2012 which require a mortgagor, a spouse or agent of the mortgagor, or any other interested party to deposit 30% of the forced sale value of mortgaged property or the outstanding amount, before adjourning or stopping a sale as being inconsistent with various Articles of the Constitution.

## 15 **Issues**

The following issues were agreed to for determination: -

1. *Whether the Petition raises any matter that requires the interpretation of the Constitution*
2. *Whether the Petition is a disguised appeal against the decision of the High  
20 Court in respect of the Application for an injunction*
3. *Whether Regulation 13(1) of the Mortgage Regulations No.2 of 2012 which requires a mortgagor, spouse, agent of the mortgagor, or any other interested party to pay to the mortgagee a security deposit of 30% of the forced sale value of the mortgaged property or outstanding loan amount contravenes*





5           and is inconsistent with Articles 21, 28, 44, 126(1) and 128 of the  
Constitution.


4. Whether Regulation 13(5) of the Mortgage Regulations No.2 of 2012 is  
inconsistent with and in contravention of Article 26 of the Constitution in so  
far as it offends the right to property and facilitates the taking of one's  
10       property without fair and just compensation or a proper hearing on the same  
and is to that extent unconstitutional.

5. Whether the passing of the Mortgage Regulations No.2 of 2012 by the  
Minister which includes Regulation 13(1) which is to the extent of requiring  
payment of a security deposit that is not provided for in the Mortgage Act, is  
15       ultra vires the Mortgage Act No.8 of 2009, contravenes and is inconsistent  
with Article 79 of the Constitution.

6. Whether the act of the Courts or any other person or official enforcing  
Regulation 13(1) of the Mortgage Regulations is unconstitutional in so far as  
it offends Articles 21, 28, 44, 79 and 126(1) of the Constitution and is to that  
20       extent unconstitutional.

7. Whether the Petitioner is entitled to the remedies as sought.

### **Representation**

At the hearing of the Petition, Mr. Robert Kirunda and Mr. Owen Murangira  
appeared for the Petitioners while Mr. Brian Musota, State Attorney appeared for  
25   the 1<sup>st</sup> Respondent and Mr. Richard Bibangamba appeared for the 2<sup>nd</sup>  
Respondent. 

5 Counsel for the Petitioners proposed to argue issues 1 and 2 independently, issues 3, 4 and 6 jointly and issues 5 and 7 independently and in that order.


### **Petitioner's Submissions**

On issue 1, Counsel for the Petitioners contended that the Petition disclosed questions requiring constitutional interpretation and a question for  
10 constitutional interpretation arises when the Petition meets the test set out in Article 137(3) of the Constitution. That based on the said Article, it is sufficient for the Petitioner to show in his or her Petition that there is an Act of Parliament or an act or omission by any person which violates specific provisions of the Constitution. Counsel added that the Petition challenges the constitutionality of  
15 Regulation 13(1) of the Mortgage Regulations which contravenes Articles 20, 21, 28, 26, 44, 79 and 126(1) of the Constitution. That it also speaks to the 2<sup>nd</sup> Respondent's act of enforcing the said impugned Regulations which violates the stated constitutional provisions. He further contended that the aforesaid impugned Regulations affect the constitutional right to access the courts for  
20 redress against the sale of a mortgagor's property and this undermines the entrenched right to be heard provided under Articles 28 and 44 of the Constitution. He relied on **Constitutional Appeal No.2 of 1998, Ismail Serugo V Kampala City Council & Anor** for the proposition that the Petition must show on the face of it that interpretation of the Constitution is required.

25 On issue 2, Counsel submitted that the 2<sup>nd</sup> Respondent indicated in his answer to the Petition that the Petition was an abuse of process because it was a

5 disguised appeal against the decision of the High Court with regard to the grant  
of a temporary injunction. In Counsel's view, this was not the case because  
Article 137 (3) (a) of the Constitution gives any person the right to petition the  
Court if they felt aggrieved by any act or omission that is contrary to or in  
contravention of the Constitution. In this case, the Petitioners had a right to  
10 petition. Further that at page 8 of Miscellaneous Application No.816 of 2021, the  
Petitioners invited Court to apply the Constitution and strike down the impugned  
Regulation 13 and in the alternative the Petitioners sought for an order referring  
the question to this Court for interpretation but the High Court declined to apply  
the Constitution and to refer the question for interpretation.

15 On issues 3, 4 and 6, Counsel for the Petitioners submitted that Regulation 13(1)  
of the Mortgage Regulations is unconstitutional because the 30% deposit  
impedes the mortgagors constitutional right to access the Courts for redress and  
to be accorded fair hearing which rights were protected under Article 28 of the  
Constitution and non derogable under Article 44 (c) of the Constitution. Counsel  
20 added that the issue of statutory provisions impeding a person's access to Courts  
by imposing a financial deposit had been declared unconstitutional by this Court  
in ***Constitutional Petition No.03 of 2009, Fuelex (U) Ltd V Uganda Revenue  
Authority*** where the question for determination was whether or not S.15 of the  
Tax Appeals Tribunal Act which requires a tax payer who has objected to a tax  
25 assessment before the tribunal to first pay 30% of the tax assessed contravenes  
Articles 21 and 126(2) (a) of the Constitution.





5 Counsel contended that under the impugned Regulation 13(1) of the Mortgage Regulations, the Mortgagee can similarly recover the whole disputed loan amount if the mortgagor fails to pay the 30% security deposit. That this irretrievably undermines the mortgagors right to be heard under Article 28 of the Constitution. He added that the Petition demonstrates that payment of the 30%  
10 deposit amounts to compulsory deprivation of property which is contrary to Article 26 of the Constitution. Counsel further contended that for deprivation of property to be constitutional, it must be done under a law which provides for prompt payment of fair and adequate compensation prior to the deprivation. Secondly, the deprivation must be made under a law which gives the deprived  
15 person a right of access to Courts of law. He relied on Article 26(2) (b) of the Constitution on prohibition of compulsory taking of possession or acquisition of property except under the law.

Counsel submitted that the impugned Mortgage Regulations deprive the Petitioners of property in the form of a 30% deposit without any inbuilt  
20 mechanism of compensation in case the Mortgagee is wrong. Furthermore, that the impugned Mortgage Regulations effectively bar the Mortgagor access to the Courts of law unless the 30% deposit is paid. Finally, that the impugned Mortgage Regulations discriminate against litigants who are Mortgagors and yet other litigants with similar cases are not burdened by payment of deposit. He  
25 relied on ***Uganda National Roads Authority V Asuman Irumba & Anor, Constitutional Appeal No.2 of 2014*** where the Supreme Court noted that Article



26 of the Constitution is violated where there is no prompt payment of fair and adequate compensation prior to the taking of or acquisition of property.

Counsel submitted that from its recent decisions particularly the decision in ***Kingston Enterprises & Ors V Standard Chartered Bank, Civil Appeal No.0446 of 2021*** and ***Ferdsuilt Engineeringg Services Limited & Another V Absa Bank***

***Limited HCMA 21 of 2021***, it was apparent that the High Court has developed a “pay now, argue later” principle in which it requires that borrowers seeking injunctions must first pay the impugned 30% before they can access any redress.

In Counsel’s view, this unequal treatment of mortgagors in this regard violates Article 21 of the Constitution which commands that all persons are equal before and under the law in all spheres of political, economic, social and cultural life.

On issue 5, Counsel contended that the impugned Mortgage Regulations being delegated subsidiary legislation are unconstitutional because they impose payment of a security deposit as a prerequisite for stoppage of a sale which is ultravires the Mortgage Act No.8 of 2009. He added then sections 20 and 21 of the Mortgage Act, provides remedies available to a mortgagee when a mortgagor defaults on payment and it was evident from the said sections that Parliament did not impose payment of security deposit by the Mortgagor as part of the remedies available to a mortgagee enforcing a mortgage. Counsel further submitted that the Minister had no power to impose a request for payment of security deposit in the Regulations when such a provision was not supported by the parent Act and as such, the Minister’s act was unconstitutional because it

5 usurped the legislative powers of Parliament conferred on it under Article 79 of the Constitution.

In creating the impugned Mortgage Regulations, the Minister together with the Central Bank interfered with the Court's power and discretion to review mortgages as it sees fit. He added that any stoppage or adjournment of a sale under a mortgage generally amounts to a review of the mortgage with regard to recovery upon default. In Counsel's view, the impugned Mortgage Regulations are unconstitutional because they also contravene Article 128 of the Constitution which protects the Courts from interference in adjudication disputes. He relied on *Petnum Pharmacy Limited V National Drug Authority Miscellaneous Cause*  
15 **No.56 of 2018** where it was held that subsidiary legislation which is made ultravires the principal Act is unconstitutional and liable to be treated as never having had any legal effect. He prayed this Court finds that the impugned Mortgage Regulations are ultra vires the Mortgage Act No.9 of 2009 and to that extent unconstitutional.

20 On issue 7, Counsel submitted that this Court finds that the Petitioners had made out a case to issue declaratory reliefs and orders sought and that the Court be pleased to grant them as laid out in the Petition. He further prayed that this Court grants a permanent injunction restraining the Respondents from implementing the impugned Mortgage Regulations for being unconstitutional.

25 **1<sup>st</sup> Respondent's submissions**



5 Counsel for the 1<sup>st</sup> Respondent argued issues 1, 2 and 6 together, 3, 4 and 5 together and 7 independently.

On issues 1, 2 and 6 he submitted that the act of the Court or any other person applying or enforcing Regulation 13(1) of the Mortgage Regulations does not raise any issue for constitutional interpretation. That this Petition was a disguised  
10 appeal against the orders of the High Court in respect of the Petitioner's application for a temporary injunction. Counsel submitted that the Petitioners applied for a temporary injunction stopping the intended sale of their property and the Registrar heard and determined the application and granted an injunction stopping the intended sale on condition that the Petitioners deposited  
15 30% of the outstanding loan amount. The Petitioners appealed against the Registrar's orders to the High Court Judge who dismissed the appeal and upheld the orders of the Registrar. That in determining the suits, the trial Judge and the Registrar applied and relied on Regulation 13(1) of the Mortgage Regulations. That there was no matter for constitutional interpretation arising from the acts  
20 of the Registrar or other judicial officer in applying Regulation 13(1) as the existing law in order to determine an application which was brought under the said Regulation.

Counsel contended that the Petition was an abuse of Court process because it was a disguised appeal against the orders of the Registrar in HCMA 816/2020  
25 where she granted the Petitioners a temporary injunction against the intended sale on condition that they deposit 30% of the outstanding loan amount within


5 45 days. That the Petition sought to circumvent the orders of the High Court in HCMA No.816 of 2020 and HCMA No.21 of 2021 because it seeks a permanent injunction restraining the Respondent from enforcing the orders of the Court. This in Counsel's view was a disguised appeal against the orders of the High Court which amounted to abuse of Court process. He relied on **Jude Mbabaali V**  
10 **Edward Kiwanuka Sekandi, Constitutional Petition No.28 of 2012** for the proposition that jurisdiction to interpret the constitution is of critical importance and as such, the same must be exercised correctly and appropriately.

Counsel submitted that the Petition sought this Court to determine the validity of the mortgages which is a substantive issue for determination in HCCS 783 of  
15 2020 pending hearing. That paragraph 8 (e) of the Petition described the High Court claim as follows; "in the said suit your Petitioners maintain that the 2<sup>nd</sup> Respondent bank acted in breach of contractual fiduciary and statutory duties and that its claims are premised on illegalities and that the attempted sales are based on void and illegal mortgages." However, under paragraph 8(n) the Petition  
20 also raises this same ground by contending that " the order made by the learned Registrar in compelling the Petitioners to pay the said security deposit within thirty days affects the Petitioner's right to property in as far as any sale of property would be based on void, illegal and unenforceable mortgages.

### **Issues 3, 4 and 5**

25 Counsel submitted that the Petitioners were challenging the constitutionality of Regulation 13(1) of the Mortgage Regulations which allows a mortgagor, spouse,


5 agent of the mortgagor or any other interested party to apply to Court to adjourn  
or stop a sale of mortgaged property due to be conducted by public auction to a  
later date however under Regulation 13(4) of the Mortgage Regulations, the  
mortgagor is required at the time of stopping the sale, to pay a 30% deposit of  
the forced sale value of the mortgaged property or the outstanding amount. In  
10 Counsel's view, Regulation 13(1) of the Mortgage Regulations was not  
inconsistent with or in contravention of Articles 21, 26, 28, 44, 79 and 126 (1)  
of the Constitution. That the said Regulation was intended to achieve a balance  
by protecting the rights of mortgagors including other interested parties and also  
the rights of mortgagees by requiring payment of 30% security deposit in  
15 exchange for stopping a mortgagee from exercising their rights to foreclose under  
the law.

Counsel further submitted that Regulation 13 (1) and (4) do not prevent  
enjoyment of the right of access to Court, and the Regulation was therefore not  
inconsistent with the right to a fair trial as guaranteed under Article 28 of the  
20 Constitution. That the impugned Regulation allows the mortgagor to apply to  
Court to adjourn or stop a sale of mortgaged property by the mortgagee while the  
Court has a duty to hear the mortgagor's application and where it shows  
reasonable cause, it may adjourn or stop a sale of mortgaged property. However,  
such adjournment or stoppage is granted subject to the mortgagor depositing  
25 30% of the forced sale value or outstanding amount of the debt owed to the  
mortgagee. 




5 Counsel argued that the case of ***Fuelex (U) Limited V Uganda Revenue Authority, Constitutional Petition No.3 of 2009*** cited by Counsel for the Petitioners was distinguishable from the instant case because in Fuelex (U) Ltd, section 15 of the Tax Appeals Tribunal Act which required a prior payment of 30% of the assessed or disputed tax, failing which the tax payer's objection would be deemed  
10 incompetent was challenged. Whereas Section 15 of the Tax Appeals Tribunal Act required prior payment for the objector to be heard by the Tax Appeals Tribunal, Regulation 13 allows a person to be heard on an application for injunction, and for Court to grant the injunction before payment of the deposit. However, in order to stop the sale, the mortgagor is then required to deposit the  
15 30% of the outstanding amount owed or of the forced sale value of the mortgaged property within a time frame ordered by the Court.

Counsel submitted that Regulation 13(1) does not allow discrimination or inequality in treatment because both the Mortgagor and the Mortgagee are allowed equal access to Court to apply for and oppose an application to stop the  
20 sale of mortgaged property. While the requirement to pay a 30% deposit at the time of stopping a sale may occasion some difference in treatment between the mortgagor and mortgagee, it amounts to a valid restriction on Article 21 which is allowed under Article 43 in order to ensure balance between the rights of these parties. That Regulation 13(1) seeks to equally protect the rights to property of  
25 both mortgagors and mortgagees, which is a requirement under Article 43 of the constitution.



5 He further submitted that the Petitioners argument that Regulation 13(1) of the Mortgage Regulations discriminates between mortgagors who can pay 30% deposit and those without the means to pay the amount alleged and as a result, the provision discriminates on economic grounds. In Counsel's view, this argument was misconceived because Regulation 13(1) applied equally to all  
10 mortgagors. He added that the fact that the fact that some mortgagors may not be able to raise the 30% deposit required to stop a sale was merely a factual circumstance that could not be relied upon to allege discrimination. In as far as Regulation 13(1) itself applies equally to all persons in the same circumstances, it is not discriminatory against defaulting mortgagors.

15 Counsel submitted under Regulation 13(1) the mortgagor is not required to pay the full amount due on the mortgage but it allows the mortgagor to deposit 30% of the amount outstanding at the time of stopping the sale. That the provision thus gives the mortgagor an opportunity to save their property by not having to pay the full amount and instead paying 30% in order to stop the sale of the  
20 property. In Counsel's view, the fact that the Petitioners are mortgagors who voluntarily entered into a mortgage agreement and undertook that their property could be lawfully sold in the event of default, they cannot now allege that such a sale amounted to deprivation of property. Counsel further submitted that a mortgagee equally has a right to property under Article 26 of the Constitution  
25 and is legally entitled under the Mortgage Act to realize securities held with them upon default of loans.



5 Counsel submitted that the Petitioners argued that Regulation 13(1) was inconsistent with and contravened Article 79 of the Constitution because the requirement for a 30% deposit was not provided for under Sections 20 and 21 of the Mortgage Act. To him this did not create any inconsistency or contravention of the Constitution. In his opinion Regulation 13 (1) was intended to  
10 operationalize the provisions of Sections 20-26 of the Mortgage Act which provide for remedies available to mortgagees upon default by the mortgagor. In Counsel's view, Regulation 13(1) was enacted to provide an equitable opportunity for an aggrieved person to seek relief from the Courts while at the same time provide protection for the Mortgagee's right to sale as guaranteed by the Mortgage Act.

15 As to whether Regulation 13(1) of the Mortgage Regulations offended the right to a fair hearing provided in Articles 28 and 44 of the Constitution, Counsel submitted that Regulation 13(1) allows both a mortgagor and mortgagee equal access to Court. Further that Regulation 13(1) allows a mortgagor the right to apply to Court to stop the sale of mortgaged property and the Court has a duty  
20 to hear the mortgagor's application and where it shows reasonable cause it has a duty to adjourn or stop the sale of mortgaged property.

## **2<sup>nd</sup> Respondent's submissions**

### **Issue 1**

Counsel for the 2<sup>nd</sup> Respondent submitted that the Petition did not raise any  
25 issues that called for constitutional interpretation and was therefore, improperly





5 before the Constitutional Court. That Article 137 of the Constitution provides for the jurisdiction of the Constitutional Court and it was a settled principle of Constitutional litigation that for the Constitutional Court to have jurisdiction to entertain any matter, it is a pre-requisite that such a matter must yield a question for constitutional interpretation and all other jurisdiction that the Court  
10 exercises is only secondary to this primary jurisdiction. He relied on **Attorney General V Major General David Tinyefunza, Constitutional Appeal No.1 of 1997** for the proposition that not every violation of the Constitution or a validity of a claim must end up at the Constitutional Court.

Counsel further submitted that the Petitioners had not raised any issues that  
15 called for interpretation of the constitution but instead, the Petitioners' claims called for application of clear and unambiguous legal provisions under the Mortgage Regulations by ordinary courts. He added that although the Petitioners cite the different provisions of the Constitution that they allege to have been violated that is; Articles 20, 21, 28, 26, 44, 79 and 126(1) of the Constitution,  
20 they failed to specify how Regulation 13(1) of the Mortgage Regulations violated those respective provisions. That the Petitioners simply raised their allegation which was not supported by any proof in the affidavit in support of the Petition deposed by Mugisha Ferdinand. He added that for most part of the affidavit in support of the Petition addressed the procedural background of the litigation  
25 between the parties in the lower Courts before setting out at paragraph 15



5 without any particularity that Regulation 13(1) of the Mortgage Regulations violates Articles 20, 21, 28, 26, 44, 79 and 126(1) of the Constitution.

## **Issue 2**

Counsel submitted that the Petition was an abuse of Court process because the Petitioners brought it as a disguised appeal against the decisions of the High  
10 Court in MA No.816 of 2021 and 21 of 2021. He further submitted that the Petitioners brought a collateral attack on the decisions rendered by the High Court in which they fully participated and were given the opportunity to argue their application and subsequent appeal. Counsel cited ***Hunter V Chief Constable of the West Midlands Police (1982) AC 529*** where Lord Diplock addressed cases  
15 of abuse of Court process where a claimant attempts to use other civil processes to re-litigate issues that have already been firmly decided by another Court of competent jurisdiction.

Counsel further submitted that the Petitioners argued that they were entitled to a reference to this Court as a matter of right and the High Court was not entitled  
20 to examine whether the Petitioners raised questions that required constitutional interpretation however this assertion was erroneous. Accordingly, to him when a Court of competent jurisdiction considers a request for a reference by a party to proceedings before it, it must weigh whether a question that requires constitutional interpretation arises on the facts before it. Such a Court is not  
25 bound to apply a mechanical approach and simply refer the question to the Constitutional Court. He relied on ***Hon. Sam Kuteesa & 2 Ors V Attorney General,***

5 ***Constitutional Petition No.46 and Constitutional Reference No.54 of 2011*** for the proposition that the applicant must show the violation alleged and its effect before a question could be referred to the Constitutional Court.

Counsel contended that the Judge in HCMA No.21 was entitled to refuse to refer a question to the Constitutional Court because no substantial question  
10 warranting constitutional interpretation arose from the facts before him. That there was no legal provision or procedure that entitled a party to bring a Petition before the Constitutional Court when a lower court refused to refer the very same question arising under the Petition to the Constitutional Court. In the circumstances where a lower Court refuses to refer a question to the  
15 Constitutional Court and a party subsequently files a Petition before the Court, Counsel argued that such a Petition should not be entertained because a lower Court of competent jurisdiction which heard the matter declined to refer the question to the Constitutional Court and must be assumed at the very minimum to have had good reasons for rejecting the request.

20 On issue No.3 Counsel submitted that a plain reading of Regulation 13(1) reveals that it gives Court discretion to 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 the outstanding amount. Further that Regulation 13(1) gives Court the discretion to order the mortgagor to pay a  
25 security deposit of 30% of the forced sale value or the outstanding amount without offering a preference between any of the two options. In Counsel's view,



5 a mortgagor who disputes the amount owed to the mortgagee may where Regulation 13(1) is applicable, pay 30% of the forced sale value of the mortgaged property which is usually lower.

He further submitted that Regulation 13(1) was in conformity with the right to a fair trial provided under Article 28 of the Constitution because, although not  
10 explicitly set out, the Courts have concluded that the Constitution recognises the right of access to Court as one of the key elements of the right to a fair trial under Article 28 of the Constitution. That Regulation 13(1) does not restrict the right to access Court or the right to actually be heard because mortgagors are entitled to plead their case. Since the right to a fair trial includes giving the  
15 opportunity to a person whose rights might be affected by a judicial decision to be heard which hearing must be carried out in an impartial manner and the affected person given the opportunity to contest the evidence and he cited ***Reverend Bakaluba Peter Mukasa V Nambooze Betty Bakireke, Supreme Court Election Petition Appeal No.4 of 2009*** for the definition of fair and impartial trial.

20 Counsel contended that under Regulation 13(1) of the Mortgage Regulations, the mortgagor is allowed to bring an application before Court seeking injunctive relief to stop or adjourn a sale and present evidence by way of affidavit in support of the application. He submitted that the decision in ***Fuelex (U) Ltd V Uganda Revenue Authority, Constitutional Petition No.3 of 2009***, which the Petitioners  
25 had cited to support their argument o violation of Articles of 28 of the Constitution distinguishable from the present case because in the Fuelex case,

5 Section 15 of the Tax Appeals Tribunal Act required prior payment of 30% of the tax assessed or the tax in dispute and failure to abide by the provision would render an objection raised by a tax payer incompetent. But in the present case no such scenario existed with regard to Regulation 13 of the Mortgage Regulations.

10 Counsel contended that Regulation 13(1) was in conformity with Article 26 of the Constitution that guarantees the right to property. Contrary to the Petitioners' argument that Regulation 13 infringes on the right to property because it restricts the right of access to Court by a person who has an interest or right over property as provided for under Article 26 (2) of the Constitution. He  
15 submitted that Article 26(2) of the Constitution as interpreted in ***Uganda National Roads Authority V Irumba & Another, Constitutional Appeal No.2 of 2014*** addresses situations of compulsory acquisition or taking of land by the Government and was not promulgated for the purpose of addressing disputes arising out of the operation of contract between private parties where the  
20 obligations are voluntarily assumed by the parties to the contract. He added that since a mortgage is essentially a contractual relationship governed by the terms stipulated in the mortgage deed, the rights of the parties are governed by that document and as a result the infringement of Article 26 of the Constitution did not arise.

25 Counsel further contended that the Mortgage Act and the Mortgage Regulations clearly specify that the exercise of the remedies of sale of mortgaged property

5 may only be exercised in circumstances where the mortgagor is in default of their obligations under the mortgage deed. He added that whereas a mortgagor may lose mortgaged property, such a loss only occurs where a mortgagee may have exercised its remedies following a mortgagor's default of their obligations. Counsel submitted that the Petitioners argument that S.29 of the Mortgage Act  
10 was insufficient to provide protection to a mortgagor in circumstances where their property may be sold by the mortgagee when such a mortgagor has a pending case challenging the validity of the mortgage was without merit because the mortgagor had an opportunity to oppose the application for sale.

On issue No. 4, Counsel submitted that Regulation 13(1) of the Mortgage  
15 Regulations did not infringe Article 79 of the Constitution because a reading of section 41(1) of the Mortgage Act accords the Minister powers of a dual nature. It empowers the Minister to make Regulations prescribing anything which may be prescribed under the Act and further, it gives the Minister powers to make Regulations Putting into effect the purposes and provisions of the Act. That  
20 Regulation 13(1) was created for the better carrying into effect of S.33 of the Mortgage Act and for those reasons the passing of the Regulations by the Minister did not contravene Article 79 of the Constitution. That the 30% provision was a necessary provision because it ensures an orderly way of handling matters where disputes arise.

25 On issue No.5, Counsel submitted that the alleged misapplication of Regulation 13 by the Courts as contended by the Petitioners was not a matter for the



5 Constitutional Court to adjudicate since this could be dealt with and corrected  
by ordinary Courts which include superior Courts of record that include the  
Court of Appeal and the Supreme Court. Counsel further submitted that the  
Petitioner had failed to show any discriminatory application of Regulation 13(1)  
and the acts cited in support of the argument of unequal treatment on account  
10 of a mortgagor proceeding under Regulation 13(1) not having access to funds to  
pay the 30% deposit were not sufficient to prove discrimination.

On whether the Petitioners were entitled to the remedies sought, Counsel  
submitted that the remedies being sought by the Petitioners were an attempt  
made in a bad faith to obtain redress against the orders of Court in HCMA No.816  
15 of 2020 and HCMA 21 of 2021 requiring them to deposit 30% of the outstanding  
loan amount as a condition for grant of a temporary injunction. Counsel prayed  
that the Petition be dismissed with costs to the Respondents.

#### **Petitioners' submissions in rejoinder**

Counsel for the Petitioners responded to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's  
20 submissions concurrently. On issues 1 and 2, he submitted that the Petitioners  
had met the test set out in ***Ismail Serugo V Kampala City Council & Another,  
Constitutional Petition No.2 of 1998*** because the Petition showed on the face of  
it that there was need to interpret the constitutionality of Regulation 13(1) of the  
Mortgage Regulations, 2012 in light of Articles 20, 21, 26, 44, 79 and 126(1) of  
25 the Constitution. Further that the Petition meets the test set out in the case of  
***Attorney General V Major General David Tinyefunza, Constitutional***

5 ***Appeal No.1 of 1997*** because the questions set out above depend, for their determination on the interpretation or construction of the provisions of the Constitution cited above. In Counsel's view, the procedure set out in Article 50 of the Constitution would have not been appropriate to obtain the remedies sought by the Petitioners.

10 Counsel submitted that the duty of the Court to apply existing law notwithstanding that the Petitioners had a right to seek interpretation of provisions of the Constitution to the existing law that was being applied to them because Regulation 13(1) of the Mortgage Regulations 2012 presumes legal certainty of the mortgage, the subject of any application seeking to stop or  
15 adjourn a sale. In Counsel's view, this presumption ignores legal considerations such as void mortgages, breach of contract or inducement of breach which would vitiate the legality of the mortgage in the first place and bring into issue the enforceability of the mortgagee's right to sell. In addition, the manner in which the Courts apply the Regulation do not permit any room for the Court to explore  
20 the aspect of reasonable cause on the part of a mortgagor unless the 30% is first paid by the applicant seeking to stop or adjourn a sale.

Counsel contended that the Respondents' submissions that the petition was a disguised appeal and abuse of legal process were misguided because the instant Petition disclosed a cause of action and was not an abuse of Court process. He  
25 added that the essence and extent to which the Court considers the merits in determining a Petition of this nature was set out by this Court in ***Fuelex (U)***

5 ***Limited V Uganda Revenue Authority, Constitutional Petition No.3 of 2009*** where  
this Court held that the cause of justice is best served when the parties to trial  
are accorded equal opportunity to present the merits of their respective cases  
before Court. Counsel further submitted that the Respondent's claim that the  
Petition seeks to determine the validity of the mortgages which is a substantive  
10 issue for determination in HCCS No. 783 of 2020 was misguided because there  
was nothing in the Petition that sought a declaration on the validity of the  
Mortgages in issue in HCCS No.783 of 2020.

Regarding issues 3, 4 & 6, Counsel submitted that at the point of seeking an  
injunction like in the instant case, the liability was and still is disputed and  
15 points of law other than quantum had been raised. In Counsel's view, a provision  
of the law that indiscriminately asks a mortgagor in cases where the fact of  
liability is not disputed but points of law have been raised, without taking into  
consideration the circumstances of the particular case, actively works to  
compulsorily deprive such litigants of their right to property without providing  
20 for their due compensation prior to the loss. Counsel argued that Regulation  
13(1) of the Mortgage Regulations presumes absence of offence on the part of the  
lender while at the same time presumes liability on the part of the borrower,  
which negates equality before the law because the rights of one party are  
protected on unsubstantiated presumptions of legality and innocence to the  
25 detriment of the other party on whom the law places a presumption of liability.





5 Counsel contended that there could not be equal treatment where objectors such as the Petitioners in the instant case were forced to make the decision whether to forego properties they had rightly deemed following full payments and wait to recover just damages from the mortgagees should the Court find that the loan was in fact repaid in full or that the mortgage was illegal. Secondly, the  
10 Petitioners get into even more debt to stop the sale until the matter is heard on merits by the Court. Whilst on the other hand, the lender has no equivalent fetter on their right to be heard by the Court.

Counsel had issue with the submission of the 2<sup>nd</sup> Respondent that the case of ***Fuelex (U) Ltd V Uganda Revenue Authority (supra)*** was distinguishable because  
15 the required deposit of 30% was not paid to the mortgagor but to the person conducting the sale and that there are other remedies against unjust enrichment where the sum claimed is found not to be owed at all or which the mortgagor can avail of himself under the Mortgage Act. He submitted that Section 15 of the Tax Appeals Tribunal Act and Regulation 13 of the Mortgage Regulations, 2012  
20 require any aggrieved person to make security deposit of 30% prior to accessing or obtaining justice in Courts of law. Further that in both provisions, non-payment of the security deposit of 30% has adverse effects to the extent that a matter cannot be heard on merit and execution may proceed against such person even when a matter is still being heard on merits by the Court.

25 On issue No.5, Counsel submitted that the Petitioners were well within their rights to bring to the attention of this Court aspects of the Regulations which

5 warrant constitutional interpretation. That the Petitioners had the right to raise  
the objection about constitutional interpretation of Article 79 of the Constitution  
with regard to enactment of Regulation 13(1) because the powers of the Minister  
to make Regulations under the Act must comply within the limits of section 41  
of the Mortgage Act and the right of the mortgagee to sell mortgaged property is  
10 prescribed in Section 26 of the Mortgage Act, 2009 .That there was nothing in  
that section that provides for the deposit of 30% where a mortgagor or some  
other person seeks to stop or adjourn a sale. He added that the Petitioners had  
already indicated that the Mortgage Act, 2009 did not create any fetter to the  
powers of the Court in issuing relief orders against the mortgagee exercising any  
15 of their remedies under the Mortgage Act. Counsel submitted that the Minister  
fell outside the scope of power conferred on him by the parent Act when he made  
the impugned Regulation and in so doing usurped the authority of Parliament  
set out in Article 79 of the Constitution by creating limitations to the rights of  
litigants under the Mortgage Act and curtailing the powers of Court. He relied on  
20 ***Pharmaceutical Society of Uganda V Attorney General, HCMC No.260 of 2019*** for  
the proposition that the employed and Ministers are accountable to Parliament  
for what they do regarding efficiency of policy and Parliament was the only Judge  
on their performance.

On issue 7, the Petitioners reiterated their submissions and prayed that this  
25 Honourable Court be pleased to grant the remedies as prayed for in the Petition.

### **Resolution of Court**

5 When this matter first came up for hearing on 18<sup>th</sup> October, 2021, Court was informed of a pending application for a temporary injunction. Since the Petition was heard, the Application has been overtaken by events and is therefore dismissed and I will proceed to determine the Petition on its merits.

I have considered the submissions of the parties, the laws and authorities availed  
10 to the Court. I am alive to the duty of the Constitutional Court under Article 137 of the Constitution which provides that:

*“137. Questions as to interpretation of the Constitution*

*1. Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.*

15 *2 ...*

*3. A person who alleges that*

*a. an Act of Parliament or any other law or anything in or done under the authority of any law; or*

*b. any act or omission by any person or authority, is inconsistent with or in  
20 contravention of a provision of this Constitution, may Petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.*

As to whether the Petition disclosed a cause of action, Kanyeihamba, JSC in **Attorney General V Major General David Tinjefuza Supreme Court Constitutional**

25 **Appeal No. 1 of 1997** set the following parameters;

*“The first ground to be decided by this Court is whether there was a cause of action to be tried by the Constitutional Court. A cause of action is the act*



5 or acts committed by the defendant, in this case the state, which gives the  
plaintiff a cause and a reason to complain. Stroud's Judicial Dictionary  
defines a cause of action as the entire set of circumstances giving rise to an  
enforceable claim. This is the principle which justified judicial  
pronouncements in such cases as *Hernaman v. Smith* (1885) 6 Exch 659,  
10 *Cook v. Gill* (1873) LR8 CP 107 and *Abdulla v. Esmail* (1969) EALR 111. In  
*Read v. Brown* (1888(22) QBD, 128(CA), it was held that a cause of action  
is every fact that would be necessary for the plaintiff to prove if traversed,  
in order to support his right to the judgment of the Court.”

He held that in determining whether the pleadings disclose a cause of action a  
15 court must be satisfied by glancing at the plaint or Petition, the affidavits and  
their annexures, if any, and statement of defense or reply to the Petition, without  
first going into the merits of the arguments for either side.

While analysing the import of Article 137(3) of the Constitution, Mulenga, JSC  
observed in ***Ismael Serugo V Kampala City Council & The Attorney General,***  
20 ***Constitutional Appeal No.2 of 1998 (SC)*** as follows:

“The Petition brought under this provision, in my opinion, sufficiently  
discloses a cause of action, if it describes the act or omission complained of  
and shows the provision of the Constitution with which the act or omission  
is alleged to be inconsistent or which is alleged to have been contravened  
25 by the act or omission, and pray for a declaration to that effect.”

5 Where a Petition challenges the constitutionality of an Act of Parliament, it  
sufficiently discloses a cause of action if it specifies the Act or its provision  
complained of and identifies the provision of the Constitution with which the act  
or its provision is inconsistent or in contravention, and seeks a declaration to  
that effect. A liberal and a broader interpretation should be given to the  
10 Constitutional Petition than a plaint in an ordinary civil suit when determining  
whether a cause of action has been disclosed. See **Baku Raphael Obudra V  
Attorney General, Constitutional Petition No.1 of 2003** and **Anita Kawooya V  
Attorney General and Another, Constitutional Petition No.42 of 2010**.

While commenting on the jurisdiction and role of this Court, Egonda Ntende,  
15 JCC in **Ssekikubo and 10 others V The National Resistance Movement (NRM),  
Constitutional Petition No. 9 of 2019** had this to say;

*“The ordinary application of the law including the constitution is a duty that  
is performed by all courts, persons, and or organs of the state as directed  
by the constitution and will not ordinarily result into an action in the  
20 constitutional court unless a question arises as to the interpretation of the  
constitution. When such a question arises, this court is seized with  
jurisdiction to answer that question as to the correct interpretation of the  
constitution.*

*It is possible in my view that a particular set of facts, may give rise to  
25 multiple causes of action, for instance either in tort or contract. A party will  
choose what action to purse, whether in tort or contract, as the law may*

5        *prescribe. A party could similarly bring an action for judicial review, if he is  
challenging a decision by a person and an authority that is not in accord  
with the law or bring a constitutional Petition before the constitutional court  
if on the same facts, a question for constitutional interpretation arises.”*

I have reviewed the Petition, affidavits in support thereto and affidavits in reply.

10    The Petitioners plead in paragraph 7 of the Petition that Regulation 13(1) of the  
Mortgage Regulations No.2 of 2012 contravenes Articles 21, 28 and 44 of the  
Constitution in as far as it limits and offends the Petitioners’ rights to fair hearing  
and the right to be heard. Further that Regulation 13(1) of the Mortgage  
Regulations No.2 of 2012 contravene Articles 79 of the Constitution in so far as  
15    it is ultra vires the scope of the Mortgage Act No.8 of 2009 when it introduces  
the requirement to pay a security deposit of the forced sale value of the  
mortgaged property or the outstanding amount before a sale can be  
stopped/adjourned by Court and to that extent interferes with the legislative  
authority of Parliament. In **Akankwasa Damian V Uganda Constitutional Petition**  
20    **No. 5 of 2011**, this Court held that a person who alleges that a legislation  
derogates from fundamental rights and freedoms protected under the  
constitution, or claims that his or her rights have been infringed on, bears the  
responsibility to establish a prima facie case that this is so.

The Petitioners also allege that Regulation 13(1) of the Mortgage Regulations No.2  
25    of 2012 is inconsistent with and in contravention of Article 26 of the Constitution  
in so far as it offends the right to property and facilitates the taking of one’s



5 property without fair and just compensation or a proper hearing on the same.  
That Regulation 13 of the Mortgage Regulations No.2 of 2012 is inconsistent with  
the right to access to justice which in itself is a tenant of the right to a fair hearing  
and is guaranteed by Articles 28, 44, 126(1) of the Constitution and that the acts  
of the Courts or any other person or official enforcing Regulation 13(1) of the  
10 Mortgage Regulations is unconstitutional in so far as it offends Articles 21, 26,  
44, 79 and 126(1) of the Constitution.

It is clear to me that the petition sufficiently sets out the provisions of the  
Mortgage Regulations complained of and shows the provisions of the constitution  
that are said to be contravened. I therefore find that this Petition raises issues  
15 that fall within the scope of Article 137 (3) (a) & (b) of the Constitution.

Issue 1 succeeds.

## **Issue 2**

**It was contended for the Respondent that the Petition is a disguised appeal  
against the decision of the High Court in respect of an injunction?**

20 The Petitioners contended that the Petition was not a disguised appeal because  
Article 137 (3) (a) gives any person the right to Petition the Court in the event  
that they feel aggrieved by an act or omission that is contrary to or in  
contravention of the Constitution and in this case, the Petitioners had a right to  
Petition. Further that at page 8 of the Miscellaneous Application No.816 of 2021,  
25 the Petitioners invited Court to apply the Constitution and strike down the

5 impugned Regulation 13 or in the alternative the Petitioners sought an order referring the question to this Court for interpretation but the High Court granted with conditions.

On their part, the Respondents argued that the Petition was an abuse of Court process because the Petitioners brought it as a disguised appeal against the  
10 decisions of the High Court in MA No.816 of 2021 and 21 of 2021 and that the Petitioners brought a collateral attack on the decisions rendered by the High Court in which they fully participated and were given the opportunity to argue their application and subsequently appeal. Further that the Petition sought to circumvent the orders of the High Court in HCMA No.816 of 2020 and HCMA  
15 No.21 of 2021 because it seeks a permanent injunction restraining the Respondent from enforcing the orders of the Court.

Article 137 (3) (a) of the 1995 Constitution which Counsel for the Petitioners relied on provides that a person who alleges that an Act of Parliament or any other law or anything is done under the authority of any law may Petition the  
20 Constitutional Court for a declaration to that effect and for redress where appropriate.

The Petitioners stated that in Miscellaneous Application No.816 of 2021, the Petitioners applied for a temporary injunction before the learned Registrar which was granted albeit conditionally. In Miscellaneous Application No.21 of 2021, the  
25 Petitioners appealed the Registrar's decision and argued substantially that the Court ought to apply the provisions pleaded in this Petition to vacate the

5 condition imposed by the Registrar requiring the applicants to pay 30% of the amount counterclaimed. Further that in Miscellaneous No.21 of 2021, the Petitioners invited Court to refer the questions for Constitutional Interpretation to the Constitutional Court but the High Court elected not to do so.

I agree with Counsel for the Petitioners that an intending Petitioner does not lose  
10 his right to Petition this Court when the High Court disagrees with him or her. In matters of constitutional interpretation, this Court is a Court of first instance and the Petitioners have a right to seek redress from this Court under Article 137(3) of the Constitution. The Article does not set any Provisionals or limitations to a person who alleges that an Act of Parliament or any other law or anything  
15 in or done under the authority of any law or any act or omission is inconsistent or in contravention of the Constitution.

I therefore find that the Petition is neither an abuse of Court process nor a disguised appeal against the decision of the High Court in respect of an injunction.

20 Issue 2 of the Petition succeeds.

### **Issues 3, 4 and 6**

The Petitioners argue that Regulation 13(1) of the Mortgage Regulations No.2 of 2012 contravenes Article 21 of the Constitution on the right to equality and freedom from discrimination, Article 28 and 44 on the right to a fair hearing,





5 Article 126(1) on exercise of judicial power and Article 128 on the independence of the judiciary.

*Regulation 13 of the Mortgage Regulations, 2012 provides as follows;*

13. Adjournment or stoppage of sale.

(1) *The court may on the application of the mortgagor, spouse, 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.*

***(Emphasis mine)***

(2) *The person conducting the sale may, upon notifying the mortgagor, mortgagee and bidders in writing, adjourn the sale to a specified date and time.*

(3) *The person conducting the sale shall specify the reason for adjourning the sale under sub-Regulation (2).*

(4) *Where a sale is stopped or adjourned at the request of the mortgagor, an agent of the mortgagor, the spouse of the mortgagor or any other interested party, the mortgagor, agent or spouse of the mortgagor or that interested party shall, at the time of stopping or adjourning the sale, pay to the person conducting the sale, a security deposit of 30% of the forced sale value of the mortgaged property or the outstanding amount, whichever is higher.*

(5) *Where the sale is stopped or adjourned at the request of the mortgagor for*



5     *the purposes of redemption, the mortgagor shall at the time of stopping or  
adjourning the sale pay a security deposit of 50% of the outstanding amount.*

Counsel for the Petitioners contended that Regulation 13 (1) of the Mortgage  
Regulations was unconstitutional because the 30% deposit impedes the  
mortgagors constitutional right to access the Courts for redress and to be  
10    accorded a fair hearing while in Court under Article 28 of the Constitution which  
right is non derogable under Article 44 (c) of the Constitution.

Article 28 of the Constitution provides that;

*(1) In the determination of civil rights and obligations or any criminal charge, a  
person shall be entitled to a fair, speedy and public hearing before an  
15    independent and impartial court or tribunal established by law....*

*(2) .....*

In ***Ganafa Peter Kisawuzi V DFCU Bank Ltd CACA NO. 54/16***, this court held that  
the applicant`s failure to pay 30% of the value of the mortgaged property contrary  
to Regulation 13 (1) of the mortgage Regulations amounted to a breach of the  
20    above provision and that an order of a temporary injunction stopping the  
intended sale was not available to him.

In ***Fuelex (U) Limited V Uganda Revenue Authority Const. Petition No. 3 of 2009***,  
Court noted that;

*“Admittedly, the right to a fair trial is a component of access to justice as a right;  
25    but this is only possible where the disputants are accorded the opportunity to*

5 appear before a court, tribunal, or other adjudicatory body, in the first place. Otherwise, without appearing before an adjudicating body, the issue of fair trial would not arise. It underscores the point that it does not suffice to conduct a trial. The cause of Justice is best served when the parties to the trial are accorded equal opportunity to present the merits of their respective cases before court. This is the  
10 essence of the protection of rights provided for under article 21(1) and 44 (c) which are respectively, with regard to equality of treatment before the law, and the right to be accorded a fair hearing in any dispute.”

Further, the Supreme Court in **Reverend Bakaluba Peter Mukasa V Nambooze Betty Bakireke, Supreme Court Election Petition Appeal No.4 of 2009** stated as  
15 follows;

“As observed above, the Constitution does not clearly define fair hearing or trial. However, the definition as given in Black’s Law Dictionary (6<sup>th</sup> Edition) is illustrative and helpful. It defines “fair and impartial trial” as follows: -

“A hearing by an impartial and disinterested tribunal; a proceeding which  
20 hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial consideration of evidence and facts as a whole” (Emphasis added). The learned authors add that it is also a basic constitutional guarantee contained implicitly in the Due Process Clause of Fourteenth Amendment, U.S Constitution. The same Dictionary then defines  
25 “Fair hearing” as follows: -

“Fair hearing. One in which authority is fairly exercised: that is, consistently




5        *with the fundamental principles of justice embraced within the conception of due process of law. Contemplated in a fair hearing is the right to present evidence, to cross-examine, and to have findings supported by evidence.”*

Article 44 of the Constitution provides for Prohibition of derogation from particular human rights and freedoms. The said Article states as follows;

10        *“Notwithstanding anything in this Constitution, there shall be no derogation from enjoyment of the following rights and freedoms- (a) freedom from torture, cruel, inhuman or degrading treatment or punishment; (b) freedom from slavery or servitude; (c) the right to fair hearing; (d) the right to an order of habeas corpus.”*

15        A reading of Regulation 13 (1) and (5) of the Mortgage Regulations indicates that court will only stop or adjourn the sale of mortgaged property upon payment of a security deposit of 30% of the forced sale value of the mortgaged property or outstanding amount and 50% of the outstanding amount where the mortgagor requests court to stop or adjourn the sale for purposes of redemption. Section  
20        33 of Mortgage Act and Reg. 13(1) and (5) of the Mortgage Regulations further grant the mortgagor an opportunity to go to court and be heard on why the sale should not go on and also to request to redeem his property. Court ought to strike a balance between the rights of the mortgagee and those of the mortgagor who at all times reserves the right to redeem his property.



5 I am persuaded by the reasoning of Mubiru, J in ***Housing Finance Bank Limited V Silk Events Bank Limited and Another, Civil Appeal No.0300 of 2021*** where he stated that Regulation 13 strikes a balance between the competing desire of the mortgagee to realize the security following default and that of the mortgagor to have his or her day in Court on questions regarding the legality or propriety of  
10 events triggering that process whilst the mortgagor pursues his or her various remedies.

Counsel for the Petitioners argued that the issue of statutory provisions impeding a person's access to Courts by imposing a financial deposit was declared unconstitutional by this Court in ***Constitutional Petition No.03 of 2009, Fuelex (U) Ltd V Uganda Revenue Authority*** where the constitutional question for  
15 determination was whether or not S.15 of the Tax Appeals Tribunal Act which requires a tax payer who has objected to a tax assessment before the tribunal to first pay 30% of the tax assessed contravened Articles 21 and 126 (2) (a) of the Constitution. Counsel added that although Owiny-Dollo, DCJ (as he then was)  
20 delivered a dissenting judgment, he never the less agreed that S.15 of the Tax Appeals Tribunal Act violated the tax payers right to access justice.

I find that the case of ***Fuelex (U) Limited V URA*** (supra) is distinguishable from the instant case because in the former S.15 of the Tax Appeals Tribunal Act required prior payment of the 30% of the tax assessed or the tax in dispute and  
25 failure to abide by the provision would render an objection raised by a tax payer incompetent whereas in the instant case, the mortgagor may move Court to

5 obtain an order to stop or adjourn the sale. The mortgagor's application is equally heard prior to the requirement to deposit 30% of the sum and such requirement is only triggered when the adjournment or stoppage is indeed granted.

It is therefore clear that the effect of S.15 of the Tax Appeals Tribunal Act differs from that of Regulation 13 of the Mortgage Regulations because the former  
10 requires prior payment for one to be heard by the Tax Appeals Tribunal whereas the latter allows one to be heard and injunctive relief sought, to be granted, on the condition that 30% of the outstanding amount owed or the forced sale value of the mortgaged property is deposited with the person conducting the sale.

The Petitioners further contended that payment of 30% deposit amounted to  
15 compulsory deprivation of property hence contravening Article 26 of the Constitution. That for deprivation of property to be Constitutional, it must be done under a law which provides for prompt payment of fair and adequate compensation prior to deprivation and secondly that the deprivation must be done under the law which gives the deprived person a right to access Courts of  
20 law.

Article 26(2) of the Constitution was interpreted in ***Uganda National Roads Authority V Irumba & Another, Constitutional Appeal No.2 of 2014*** which addressed situations of compulsory acquisition or taking of land by the Government. The Supreme Court noted that after considering the historical  
25 background in this Country where people's properties were compulsorily acquired by Government during the past regimes, the Constitutional Court



5 concluded that the 1995 constitution was very restrictive on the powers of the Government to acquire land compulsorily.

In my view, although Article 26 of the Constitution protects the right of every person to own property, it was not promulgated for the purpose of addressing disputes between private parties arising out of contractual relationships. In the  
10 instant case the rights of the parties are governed by the contractual document in this case the Mortgage Deed and as a result infringement of Article 26 of the Constitution does not arise.

The Mortgage Act and the Mortgage Regulations clearly specify that the remedies of sale of mortgaged property may only be exercised in circumstances where the  
15 mortgagor is in default of their obligations under the mortgage deed. Section 8 of the Mortgage Act provides that;

“Mortgage of land to take effect as security only.

1) On and after the date of the commencement of this Act, a mortgage shall have effect as security only and shall not operate as a transfer of any  
20 interest or right in land from the mortgagor to the mortgagee; but the mortgagee shall have, subject to this Act, all powers and remedies in case of default by the mortgagor and be subject to all the obligations conferred or implied in a transfer of an interest in land subject to redemption.”

Whereas a mortgagor may lose mortgaged property, such a loss will only occur  
25 where a mortgagee may exercise its remedies following a mortgagor’s default of


5 their obligations which in my view, is consistent with Article 26 of the Constitution because the mortgagee also has interest in the mortgaged property which interest is protected as a proprietary right.

The Petitioners further contend that the impugned Mortgage Regulations discriminate against litigants who are mortgagors and yet other litigants with  
10 similar cases are not burdened by payment of deposit. He relied on ***Kabandize & 20 Ors V Kampala Capital City Authority, Civil Appeal No.28 of 2011*** where the question before Court was whether section 2(1) (b) of the Civil Procedure and Limitation (Miscellaneous Provisions Act) CAP 72 accorded preferential treatment to one party against the other before the law and the Court declared  
15 the said section unconstitutional.

Article 21 of the Constitution provides for the right to equality and freedom from discrimination and states as follows;

(1) *All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal  
20 protection of the law.*

(2) *Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.*



Article 20 of the Constitution which the petitioners aver is infringed provides for fundamental and other human rights and freedoms and it states thus;

20. (1) *Fundamental rights and freedoms of the individual are inherent and not granted by the State.*

(2) *The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.*

In the South African decision of **S v Ntuli 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC) at para 18**, Didcott J speaking for the Court stated that; the right to equality before the law is concerned more particularly with entitling everybody, at the very least, to equal treatment by our courts of law. It was said further that no one is above or beneath the law and that all persons are subject to law impartially applied and administered.

A reading of Regulation 13(1) of the Mortgage Regulations requires all mortgagors who apply to adjourn or stop a sale to pay 30 % of the outstanding amount or forced sale value of the mortgaged property. The provision demands formal compliance by all mortgagors seeking relief under the provision and the fact that the provision levies a requirement that might be burdensome to a person who may not be able to raise the deposit amount does not necessarily that it prefers persons who might have the deposit amount. The requirement to make a deposit under Regulation 13(1) is clearly devised to stop frivolous and vexatious mortgagors from frustrating mortgagees seeking recovery of monies rightfully



owed. The Regulation is necessary to protect mortgagees from unnecessary adjournments or stoppage of sales that would result in satisfaction by defaulting mortgagors.

In ***Fuelex (U) Limited V Uganda Revenue Authority, Constitutional Petition No.3 of 2009***, Owiny-Dollo, DCJ (as he then was) held that;

*“A person who alleges that a legislation derogates from the fundamental rights and freedoms protected under the Constitution, or claims that his or her rights have been infringed on, bears the responsibility to establish a prima facie case that this is so.”*

In the instant case, the Petitioners have not demonstrated how Regulation 13(1) of the Mortgage Regulations discriminates against different mortgagors beyond levying the claim. I therefore find that Regulation 13 of the Mortgage Regulations is not inconsistent with Article 26 of the Constitution.

For the above reasons, it is my finding that Regulation 13 (1) and (4) of the Mortgage Regulations do not contravene Articles 20,21, 26, 28 and 44 of the Constitution.

Issues 3, 4 and 6 fail.

### **Issue 5**

It was submitted for the Petitioners that the impugned mortgage Regulations being delegated subsidiary legislations were unconstitutional because they impose payment of a security deposit as a conclusion for stoppage of a sale which

5 is ultra vires the Mortgage Act No.8 of 2009. That it was evident under sections 20 and 21 of the Mortgage Act that Parliament did not impose payment of a security deposit by the Mortgagor as part of the remedies available to a mortgagee enforcing a mortgage and the Minister had no power to impose a security deposit in the Regulations when such a provision was not supported by the parent Act.

10 Article 79(1) of the Constitution gives power to Parliament to make laws on any matter for the peace, order, development and good governance of Uganda.

Article 79(2) of the Constitution provides that except as provided in this Constitution, no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under authority conferred

15 by an Act of Parliament.

Section 41 of the Mortgage Act provides for the power of the Minister to make Regulations. It also states that the Minister may in consultation with the Central Bank make Regulations prescribing anything which may be prescribed under this Act and generally for the better carrying into effect of the purposes and

20 provisions of this Act and removing any difficulties occasioned by the coming into force of this Act.

The Mortgage Act provides in Section 20 for the remedies available to mortgagees when default happens while Regulation 13 (1) of the Mortgage Regulations on the other hand provides for redress for a mortgagor, spouse, agent of a mortgagor



5 or any other person to adjourn a sale as provided for under section 20 and 21 of the Mortgage Act.

In ***Uganda Law Society V Kampala Capital City Authority & Another, Miscellaneous Cause No.243 of 2017*** Court quoted with approval the holding of

10 ***Mixnam Properties Ltd V Chertsey U.D.C (1964) 1 QB 214*** that “*If the subsidiary legislation is found to be partial or unequal in operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; or if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, then such subsidiary legislation could be regarded as unreasonable and ultra vires.*”

15 Section 41 of the Mortgage Act grants the Minister and the central bank powers to make Regulations to achieve the purposes and legislative objective of the Mortgage Act. The Act confers on them powers to do so and the acts in the Regulation are deemed to be those in the Act. This in line with Article 79 of the constitution which permits Parliament to delegate the making of some laws.

20 The Petitioner did not lead any evidence to prove that the Regulations are arbitrary, irrational or illegal. Regulation 13(1) of the Mortgage Regulations was enacted to provide an equitable opportunity for an aggrieved person to seek relief from Court while at the same time protecting the Mortgagee’s right to sale as guaranteed by the Mortgage Act.

25 Issue 5 fails



5    **Issue 7**

**Remedies**

Counsel for the Petitioners prayed that Court finds that the Petitioners had made out a case for the declaratory reliefs and orders sought, and that the Court be pleased to grant them as laid out in the Petition. Further that this Court grants  
10    a permanent injunction to restrain the Respondents from implementing the impugned mortgage Regulations for being unconstitutional.

On their Part, the Respondents prayed that the Petition be dismissed with costs.

Since the main issues in contention in this Petition were resolved in the negative, it follows that the Petition does not merit the reliefs sought by the Petitioner.

15    Accordingly, I make the following findings and declarations;

- a) The Petition raises matters that merit the interpretation of the Constitution.
- b) Regulation 13(1) and (4) of the Mortgage Regulations No.2/2021 does not contravene and is not inconsistent with Articles 21, 28, 44,  
20    126(1) and 128 of the Constitution.
- c) Regulation 13 (5) of the Mortgage Regulations No. 2/2012 does not contravene and is not inconsistent with article 26 of the Constitution.
- d) The act of the Courts or any other person or official enforcing  
25    Regulation 13(1) of the Mortgage Regulations does not contravene

5 or is not inconsistent with Articles 21, 28, 44, 79 and 126(1) of the  
Constitution.

- e) The passing of the Mortgage Regulations No.2 /2012 by the Minister  
which includes Regulation 13(1) to introduce payment of a security  
deposit is not ultra vires the Mortgage Act No. 8/2009 and does not  
10 contravene or is not inconsistent with article 79 of the Constitution.

In the result it is proposed that the Petition fails and be dismissed for lack of  
merit.

Each party to bear its own costs.

Dated at Kampala this.....<sup>th</sup>  
6.....day of.....10.....2023

15 

Cheborion Barishaki

**JUSTICE OF APPEAL/ CONSTITUTIONAL COURT**

**THE REPUBLIC OF UGANDA**

**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**

*[Coram: Egonda-Ntende, Cheborion, Bamugemereire, Kibeedi & Mugenyi,  
JJCC]*

**CONSTITUTIONAL PETITION NO. 18 OF 2021**

**BETWEEN**

FERDSULT ENGINEERING SERVICES LTD=====PETITIONER NO.1  
MUGISHA FERDINAND=====PETITIONER NO.2

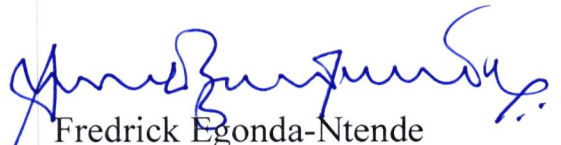
**AND**

THE ATTORNEY GENERAL=====RESPONDENT NO.1  
ABSA BANK UGANDA LTD=====RESPONDENT NO.2

**JUDGMENT OF FREDRICK EGONDA-NTENDE, JCC**

- [1] I have had the opportunity of reading in draft the judgment of my brother, Cheborion, JCC. I agree with him for the reasons that he has provided that this petition should fail.
- [2] As Bamugemerire, Kibeedi, and Mugenyi, JJCC, agree this petition is dismissed with each party bearing his costs.

Dated, signed and delivered at Kampala this <sup>th</sup> 6 day of 10 2023

  
Fredrick Egonda-Ntende  
**Justice of the Constitutional Court**





**THE REPUBLIC OF UGANDA**  
**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**

*(Coram: Egonda-Ntende, Cheborion, Bamugemereire, Kibeedi & Mugenyi, JJCC)*

**CONSTITUTIONAL PETITION NO.18 OF 2021**

5      **1. FERDSULT ENGINEERING SERVICES LTD**

**2. MUGISHA FERDINAND:.....PETITIONERS**

**VERSUS**

**1. THE ATTORNEY GENERAL**

**2. ABSA BANK UGANDA**

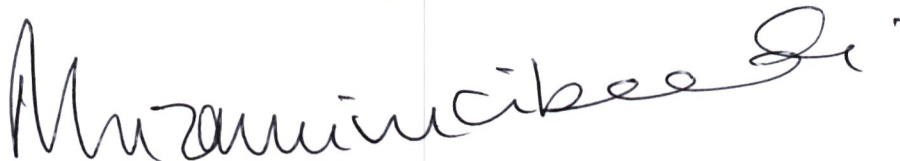
10      **(Formerly Barclays Bank Uganda Ltd):.....RESPONDENTS**

**JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JCC**

I have had the benefit of reading in draft the Judgment prepared by my learned brother, Cheborion Barishaki, JCC.

15      I concur with the analysis, conclusions and orders proposed. I have nothing useful to add.

Delivered and dated at Kampala this .....<sup>th</sup>6..... day .....<sup>th</sup>10..... 20<sup>th</sup>23.



**Muzamiru Mutangula Kibeedi**

**JUSTICE OF THE CONSTITUTIONAL COURT**



THE REPUBLIC OF UGANDA

**THE CONSTITUTIONAL COURT OF UGANDA  
AT KAMPALA**

*(Coram: Egonda-Ntende; Cheborion, Bamugemereire, Kibeedi & Mugenyi, JJCC)*

**CONSTITUTIONAL PETITION NO. 18 OF 2021**

1. FERDSULT ENGINEERING SERVICES LTD  
2. MUGISHA FERDINAND ..... PETITIONERS

**VERSUS**

1. ATTORNEY GENERAL  
2. ABSA BANK  
(formerly Barclays Bank Uganda Ltd) ..... RESPONDENTS



**JUDGMENT OF MONICA K. MUGENYI, JCC**

I have had the benefit of reading in draft the lead Judgment of my brother, Barishaki Cheborion, JCC in this matter.

I agree with the decision therein that the Petition be dismissed for the reasons advanced.

Dated and delivered at Kampala this .....<sup>th</sup><sub>6</sub> day of .....<sub>10</sub>....., 2023.



**Monica K. Mugenyi**

**Justice of the Constitutional Court**