

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT-00-CC-MA- 0226 OF 2005

(Arising from HCT-00-CC-C.S 0257 of 2005)

AFRICAN TEXTILE MILLS LTD

APPLICANT

VERSUS

CO-OPERATIVE BANK LTD [In liquidation]  
THE LIQUIDATOR CO-OPERATIVE BANK LTD  
VINCENT KAWUNDE T/A OSCAR ASSOCIATES

RESPONDENTS

**BEFORE THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE**

**RULING**

1. The applicant, Ms African Textile Mills Ltd, is seeking a temporary injunction from this court to restrain the defendants from selling the chattels found on the property comprised in Leasehold Register Volume 785 Folio 12, Plot 78-96, Palisa Road, Mbale pending the hearing and disposal of the head suit, in which, inter alia, the applicant seeks a permanent injunction to restrain the respondents from continuing with the acts complained of. At the commencement of the hearing of that application, Mr. Phillip Karugaba, learned counsel for the respondents raised a preliminary objection and that objection is the subject of this ruling.
2. Mr. Phillip Karugaba basically submitted that this suit is res judicata, and is therefore barred from being entertained by this court. The applicant had previously filed High Court Civil Suit No. 184 of 2002, which had been fully and finally concluded by a consent judgement agreed to by both parties. He referred to Section 7 of the Civil Procedure Act, and in particular to explanation note 4 thereof. The issue in this suit

whether or not the chattels in question formed part of the mortgaged property was an issue that ought to have been put forth in the previous suit, and the applicant having chosen not to do so, was precluded from raising the same by way of fresh suit.

3. Mr. Augustine Kibuka Musoke, learned counsel for the applicant, replied that it is true that the applicant had filed the suit referred to by Mr. Karugaba but that the current claim was not a matter that was litigated upon in that suit. He submitted that the mortgages executed by the applicant referred only to land and buildings and did not include machinery or chattels as part of the mortgaged property. In any case, he continued, chattels as security is governed by the Chattels Transfer Act, under which the instrument covering the chattels in question would have been registered, which was not the case. The first suit was limited to land and buildings and the second suit is limited to chattels. He therefore submitted that the second suit is not res judicata. Secondly Mr. Kibuka Musoke submitted that the present suit was not between the same parties as the previous one. This current suit is against three defendants whereas the previous suit was against one defendant only.
4. The brief facts so far as they relate to the decision in this case are not in dispute. The applicant is the registered proprietor of the land comprised in Leasehold Register Volume 785 Folio 12, Plot 78-96, Palisa Road, Mbale. It mortgaged the said lands to the first defendant before the defendant went into liquidation. On 4<sup>th</sup> January 2002 Defendant No. 1 issued to the applicant a statutory notice of sale of the mortgaged property under Section 9 of the Mortgage Act. The applicant then filed a suit in the High Court of Uganda seeking to stop such sale. This was HCCS No. 184 of 2002.
5. The parties started talking exploring resolution of the matters in issue on terms agreeable to both parties. Disagreement struck. And on 30<sup>th</sup> April 2004 Defendant No. 1 instructed Oscar Kawunde to advertise the mortgaged property for sale. Kawunde caused to be published an advert in the press notifying that a sale of the mortgaged property will take place on 8<sup>th</sup> June 2004. It read in part as follows;

*“...NOTICE OF SALE BY PUBLIC AUCTION/PRIVATE TREATY UNDER  
(CAP 205 REGISTRATION OF TITLES ACT) AND THE MORTGAGE  
DECREE  
LEASEHOLD REGISTER VOLUME 786 FOLIO 17 PLOT 78-96 PALLISA  
ROAD, MBALE MUNICIPALITY MEASURING APPROX. 9.19 HEACTARES.  
REG. PROP/MORTGAGOR: AFRICAN TEXTILE MILL LTD OF PO BOX 96  
MBALE*

*On the instructions of Messers Adriko & Karugaba Advocates, on behalf of their client The Cooperative Bank Limited (IN LIQUIDATION) MORTGAGE I shall sell by public auction/private treaty after the expiry of thirty days from the date of this notice the above mentioned property unless the Mortgager pays in full all monies owing under the mortgage before the date of the sale.*

*Developments include a textile mill and a number of other factory buildings and stores, workers quarters for both junior and senior staff all located within the municipality of Mbale.”*

6. The applicant filed an interlocutory application to stop this sale. The head suit, and I presume the interlocutory application, were then settled by consent judgment setting out the terms of the payment of the decretal amount. It appears that the decretal amount in the said suit has never been satisfied by the applicant.
7. Defendant No.1, acting as a mortgagee, then caused a new notice of sale to be published in the media on March 14<sup>th</sup> 2005 advertising for sale on the 14<sup>th</sup> April 2005. The notice reads in part,

*“...I shall sell by public/private treaty after the expiration of thirty (30) days from the date of this notice the above mentioned mortgaged property unless the mortgagor pays in full all the monies owing under the mortgage before that date of sale.*

*Developments include a textile mill and a number of other factory buildings and stores, workers quarters for both junior and senior staff all located within the municipality of Mbale. The factory comprises nominal 24,000 spindles spinning plant with a weaving section of 132 looms, a processing and finishing plant comprising of a complement of machines, a print studio equipped for rotary screen printing application etc.”*
8. It is the threat to sale the factory equipment which has brought the applicant to this court seeking relief on the grounds that this equipment was not subject to the mortgage, and could not in fact be part of the mortgage, as its use as security is governed by an entirely different law, the Chattel Transfer Act.
9. Initially I formed the impression that the preliminary objection had merit but on a further scrutiny of the matter, I am satisfied that the objection must fail.
10. In the first suit the applicant acted to deal with the defendant No.1’s threat to realise the money due to him from the applicant by enforcement of defendant No.1’s rights as a mortgagee over land and buildings on the property referred to above. There was no threat at the time to chattels found on those lands and buildings as clearly these could not form part of the mortgaged property not being land or buildings.
11. And no such threat to chattels could exist in law founded upon a mortgage as a mortgage is an interest only in land and buildings thereon. See Section 1 (b) of the Mortgage Act, which states,

*“ ‘mortgage’ means any mortgage, charge, debenture, loan agreement or other encumbrance, whether legal or equitable which constitutes a charge **over an estate or interest in land** in Uganda... and which is registered under the Act.”*

12. As no threat existed at the time of filing the previous suit to chattels in question now the issue of restraining the defendant No. 1, could not have arisen at the time the first suit was filed against the defendant No.1. It is now that the defendant No.1, purporting to act as a mortgagee realising the security available under the mortgage, has now threatened specifically to sell the chattels in question.
13. Defendant No.1 has opted to proceed under the mortgage between it and the applicant, and not in execution of the decree in the earlier suit. This option opens up this kind of challenge, given that on the face of it, it is a proceeding beyond matters that are governed by the Mortgage Act. A new and different cause of action, in trespass and conversion, from the one in the previous suit, seems to be available to the applicant, to bring the current action.
14. In my view, the applicant is entitled to come to court and contest the matter. The matter is not res judicata. The preliminary objection is overruled.

Dated at Kampala this 20<sup>th</sup> day of January 2005

FMS Egonda-Ntende  
Judge