



enforcement of the Plaintiff's right in equity to redeem the mortgaged property; for a permanent injunction restraining the Defendant from disposing of or interfering with the Plaintiff's land; and costs of the suit, among other reliefs. In the alternative, the Plaintiff prays for a declaration that the mortgage is a nullity, void and unenforceable and an order for the release of his certificate of Title.

Representation:

Mr. Joseph Bossa and Mr. Bosco Ssozi for the Applicant.

Mr. Nangwala for the Respondent.

Briefly, the Applicant's case is that he obtained a loan of Shs.46m from the Defendant against a security described as Kyadondo Block 196 plot 285. That he has been paying off the said loan and to-date has paid off Shs.15m. That the Respondent has now advertised the Plaintiff's property for sale although the Plaintiff has not failed to pay the loan balance. He contends that substantial or irreparable loss will occur if the Respondents are not restrained by Court from disposing or otherwise interfering with the said property. That the property is in danger of being wasted, damaged or alienated by the Defendants and, finally, that it is just and equitable that a temporary injunction be issued to restrain the Respondent/Defendant from disposing off the said property pending the hearing of the main suit. From the records, the main suit is yet to be fixed for hearing.

The above is briefly the Applicant's version of the events surrounding this case. Now the Respondent's version.

According to the Respondent, the Applicant borrowed a sum of Euros 19,250 at an agreed interest of 15% which by 1.4.2005 had accumulated to Euros 47,840. A legal mortgage was executed with the consent of the Plaintiff authorising the Defendant to sell the property without applying to Court. The Plaintiff has failed to repay the loan which has prompted the Defendant to advertise for sale of the mortgaged property. In addition to the remedies provided in the loan agreement, the Defendant is praying for Judgment against the Plaintiff by way of a counter claim for the said amount with interest.

The Applicant has raised a number of issues. They include the allegation that the mortgage transaction contravenes S.39 of the Land Act, Cap 227, in that the spouse's consent was not sought and the allegation that the Respondent is not a registered money lender and that its terms for lending money are prohibitive and illegal. The Respondent argues that the Applicant's wife duly consented to the mortgage transaction. As regards lack of a money lending licence, the Respondent has evoked S.21 of the Money Lenders Act, Cap 273 and argued that the provisions in the Act regarding interest and licence to lend are irrelevant if the money lending transaction is effected by a legal or equitable mortgage which are present in this case.

I have very carefully addressed my mind to the arguments of both counsel.

0.37 r 1 under which the application was brought provides:

*“1. Cases in which temporary injunction may be granted.*

*Where in any suit it is proved by affidavit or otherwise -*

*(a). that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or*

*(b).*

.....

.....

*the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”*

Under the above law, all the Applicant needs to show is that the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit. It is the paramount duty of a Court to which an application of this nature is made pending the determination of the suit to see that the suit, if successful, is not rendered nugatory. Accordingly, grant of a temporary

injunction is a matter within the discretion of the Court. The discretion must, however, be exercised judicially.

Over the years, the Courts have evolved principles to consider while determining whether or not to grant a temporary injunction. For record purposes, the Applicant must show:

1. That the purpose of the injunction is to preserve the status quo until the dispute is investigated in the suit and finally disposed of.
2. That he has a prima facie case with a probability of success.
3. That the Applicant would suffer irreparable injury which an award of damages would not adequately atone if the injunction is refused and later on he turns out to be the successful party in the suit.

If the Court, after considering the above, is in doubt, it will decide on the balance of convenience.

Firstly, the status quo.

That the suit property has been advertised for sale is not an issue. The advertisement appeared in the Monitor Newspaper of 3/5/2005. The Applicant was given 30 days in which to pay or forfeit the suit property. The thirty days expire on 3/6/2005, just 10 days from now. If the property is hurriedly sold and the Applicant's suit is successful, the suit would be rendered nugatory and the Applicant would have been condemned unheard.

The property is said to have factory buildings on it with equipment and residential quarters where some members of the Applicant's family live. That would be no mean loss.

From the pleadings, the Applicant is in possession. Denying the Applicant's prayer would change the status quo between the parties with respect to who has possession of the land and who holds title to the land. To that extent, I 'm satisfied that the case meets the first requirement for a grant of a temporary injunction in that its aim is to maintain the status quo pending a decision of the issues raised in the main suit on the merits.

Secondly, the application requires the Court to consider the likelihood of success on the merits.

In the case before me, the Applicant has alleged that the mortgage transaction which the Respondent seeks to enforce is a nullity on account of alleged non-compliance with mandatory provisions of the law. I have understood counsel's argument on this point to raise at least three points worthy of mention:

- i. That the Respondent is not a licensed money lender;
- ii. That the transaction is barred by S.39 (1) (a) of the Land Act; and
- iii. That the Applicant has not exhausted his equity of redemption.

I'm aware that this is a delicate area where if one is not careful, one may end up delving into the merits of the case prematurely. Since it is one of the factors I ought to consider, I will do my best.

It is not clear from the pleadings as to whether the Respondent is a registered money lender. Be that as it may, the parties executed a mortgage in which the loan was secured by the Applicant's immovable property. Under S.21 (1) (c) of the Money Lenders Act, cap 273, the Act does not apply to any money lending transaction where the security for the repayment of the loan and interest on the loan is effected by execution of a legal or equitable mortgage upon immovable property or of a charge upon immovable property or of any bonafide transaction of money lending upon such mortgage or charge. The exemption provided for in this section applies whether the transactions referred to above are effected by a money lender or not. This law appears to be on the Respondent's side herein.

As to the transaction being barred by S.39 (1) (a) of the Land Act, the Respondent has sworn an affidavit through one Haruna Semakula, its Ag. Director Corporate Services, that the mortgage was duly executed after getting the consent of the Applicant's wife Nandawula Bitijuma Katusiime. He has attached a copy of the said consent. I have not seen the Applicant controverting that assertion in a subsequent affidavit. The attached copy of

the purported consent bears a photo said to be that of Applicant's wife. Again, the law here appears to be on the Respondent's side.

As to the Applicant not exhausting his equity of redemption, the parties agreed that in the event of a default on the loan payment, the mortgage would be at liberty to realize his security. It is trite that the right to sell can be exercised without recourse to Court where such a right is expressly reserved in the mortgage agreement. Otherwise, the sale must be conducted with the sanction of the Court. The law as I understand it is that if the mortgagee has the power of sale without a Court order, the Court has no power to order other remedy or post pone the sale. The only way the mortgagor can redeem his land would be to repay the loan. It is not clear from the pleadings whether, and if so, how the Respondent is interfering with the Applicant's equity of redemption or whether it has expired. Even then it appears to me that the chances of the Applicant succeeding in the main suit are slim. As the evidence stands now, for him to succeed in the main suit, he will have to fight harder than the Respondent as the law appears to be more on the Respondent's side than the Applicant's.

Thirdly, as to the Applicant suffering irreparable injury, the law requires that the injury be a substantial or material one, that is, one that cannot be adequately compensated for in damages. The Applicant mortgaged his property. The understanding must have been that upon default, the



Respondent would sell it to realise its money. If the value of the land far exceeds the amount at stake, the difference would be paid to him. I have honestly not seen what irreparable injury the Applicant would suffer if this application were denied, other than, perhaps, the inconvenience he would suffer re-locating his family on secure ground. He ought to have reasonably addressed his mind to that at the time he entered into the mortgage transaction.

Finally, as already indicated, in determining whether the status quo should be maintained, it is well established that regard should be had to the balance of convenience.

The Respondent's money was secured by the suit property. Applicant's title is already encumbered by the Respondent's mortgage over the suit property. The effect of an injunction would be to make the property available for sale or otherwise, depending on the outcome of the main suit. In the meantime, the Respondent's money continues to attract interest. What started as 19,250 Euros was, according to the Respondent, 47840 Euros by 1/4/2005. While the Applicant, if he is not heard in the main suit and he is successful stands to lose a valuable asset, land, the Respondent stands to lose nothing given that land in this country gains value every day that passes. It has not been pointed out to Court what burdens, if any, the Respondent is experiencing in preserving the status quo to raise the inference that the same would increase unless the remedy sought herein is refused. I am of the

considered view, on the balance of probabilities, that the harm the Applicant would suffer if Court did not stop the sale for now would outweigh the harm that the Respondent would suffer if the Court refused to grant the remedy sought herein. I would have come to a different conclusion if the parties had agreed that by a stated date the loan should either be fully paid or the security realised.

I was invited to order, in the event that I'm inclined to grant the remedy sought herein, that the outstanding amount as at 1/4/2005, that is, Euros 47,840, be deposited in Court as a means to reinforce the fact that the Applicant is not here to waste Court's time and to abuse the commercial justice in this country. After giving anxious consideration to this prayer, I'm inclined to the view that doing so wouldn't be promoting fairness in the matter. This is not an involved matter that would take a lot of Court's time. In view of the objection launched against the intended sale, I'm of the opinion that a commitment by the parties to have the main suit disposed of expeditiously, say within three months, would promote fairness in the case.

For the reasons advanced above and on other equitable considerations, I would allow this application. I would however order that the main suit be disposed of within THREE months from the date of this order excluding the forth coming Court vacation, time and circumstances allowing. In the event that the Applicant exhibits lack of keenness towards completion of his case, this Court would be constrained to review this order.

The Respondent shall have costs herein in any event. I so order.

Yorokamu Bamwine

**J U D G E**

23/05/2005