

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION

HCT-00-CC-MA-0300-2008

FRANCIS KAYANJA APPLICANT

VERSUS

DIAMOND TRUST BANK OF UGANDA LTD.RESPONDENT

BEFORE: HON. MR. JUSTICE LAMECK N. MUKASA

RULING:

This is an application brought by Chamber Summons under Order 41 rule 9 of Civil Procedure Rules. The Applicant Francis Kayanja is seeking Orders that:-

- (a) A temporary injunction does issue restraining the Respondent from selling, alienating or in any way disposing off the Applicant's property until after the hearing and determination of the main suit:-
- (b) The costs of the application be provided for

The grounds for the application are that:-

1. The Applicant has already paid off the Respondent.

2. The Applicant's properties are of considerable value than the Respondent's debt (if any) and the Applicant shall suffer irreparable loss if the property is sold.
3. It would be just and equitable that a temporary injunction does issue.

The application is supported by an affidavit deponed to by the Applicant. The Applicant therein avers that on 28th April 2004 he borrowed from the Respondent, Diamond Trust Bank Uganda Ltd, Shs100,000,000/= The Respondent accepted as security three Applicant's properties, to wit Kyadondo Block 222 Plot 314 Namugongo, Kyadondo Block Plot 1546 and Plot 371 Kamuli Kireka, all valued at more than Shs500,000,000/=. That he had paid all the principal sum plus a substantial sum on the interest. That despite the payment the Respondent has gone ahead to give Quickway Auctioneers and Bailiffs instructions to advertise and sale the Applicant's properties. Consequently the Applicant filed Civil Suit 154 of 2008 and this application.

The Respondent filed an affidavit in reply deponed to by Betty Rukyalekere, its company secretary. She therein states:-

"5. That the Applicant defaulted in repayment of the debt by reason of which the Respondent by letter dated 14th May 2007 demanded for settlement of the sums outstanding then being Ugshs97,10,000/= --- (A copy of the letter of demand is attached as "B").

6.The Respondent additionally issued a statutory notice of sale of the mortgage property on 19th June 2007. (A copy of the Statutory Notice of sale is attached as "C")

7.That the Respondent subsequently advertised for sale of the securities in the Monitor Newspaper dated 6th December 2007 however the sale was not conducted on 7th January 2008 on the basis that the Applicant had undertaken to settle his indebtedness.

8. That in default of settlement of the debt sum, the securities were re-advertised for sale on 22nd May 2008.

9. That as at the 29th June 2008 the Applicant was indebted to the Respondent in the sum of Ugshs30,985,467/= --- which debt continue to accrue interest. (A copy of the statement of account is attached as “E”).”

At the hearing the Applicant was represented by Mr. Mukasa Lugalambi. There was no representation for the Respondent and hearing proceeded exparte.

The law is that the granting of a temporary injunction is a judicial discretion which court exercises judiciously upon considering the conditions below. First whether the applicant has shown a prima facie case with a probability of success. Secondly that the Applicant would suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if court is in doubt on any of the above two, it will decide the application on the balance of convenience. See, Geilla Vs Cassman Brown & Co Ltd (1975) EA 358, ELT Kiyimba Kagwa Vs Hajji Abdu Nasser Katende (1986) HCB 43.

The prima purpose of a temporary injunction is to preserve the status quo pending the disposal of the main suit. See, Noomohamed Jamamohamed Vs Kasamali Virji Nadhain (1953) 29 EACA 8; Erison Rainbow Musoke Vs Ahamed Kezeraha (1987) HCB 81, Order 41 rules 1 and 2 of the Civil Procedure Rules.

Therefore, first and foremost, it is necessary to identify the status quo. In his affidavit the Applicant avers that his properties were advertised for sale in the Monitor Newspaper of 22nd May 2008. The application seeks to stop that advertised sale. The advert by Quickway Auctioneers and Court Bailiffs (Annexure “D”) is of an intended sale of the properties to be conducted on 24th June 2008. In the Respondent’s affidavit in a reply, filed on 23rd June 2008, the Respondent does not say that the property had been sold. No evidence was adduced to that effect. In the circumstances I find that that Applicant’s properties had been advertised for sale but not as yet sold.

Regarding the first test, whether the Applicant has a prima facie case with a probability of success, the trend in Uganda is to consider only whether there are serious questions to be tried.

See Robert Kauma Vs Hotel International SCCA No. 8 of 1990, Kiyimba Kaggwa Vs Haji Naser Katende (supra), Muhamed Yakim Vs Abdu Khamis H.C.C. S. No. 217 of 1994

A prima facie case has to be disclosed in the Applicants pleadings in the main suit. In the plaint the Applicant, inter alia, claims that:-

1. By the end of May 2008 the Applicant had paid off the entire debt of the Shs10,000,000/= which was the principal sum and also Shs8,948,813/= as interest leaving only a balance of Shs32,413,441/= as interest on the principal sum.
2. He paid money to the defendant in accordance with the contract dated 17th July 2006 and his contract to repay the defendant was still running up to October 15th 2008.
3. The defendant to advertise his property for sale before the 15th October 2008, is in breach of the contract between the parties and will be an outright rip off of the plaintiff since property to be sold is well above Shs500,000,000/=
4. The defendant's debt, if any, owing does not warrant the sale of his properties which are well above any existing debt as may be claimed by the defendant.

Annexure A to the plaint is the loan agreement. On repayment period it states that –

“---the loan will be repaid in a maximum period of thirty months by thirty equal installments comprising principal and interest by transfer from your current account with us as per repayment schedule.”

In the event of any default the agreement provided that:-

“the entire loan balance outstanding will become due and payable immediately and any arrears amount will attract interest at the then applicable ruling rate.”

Annexure B is a Reschedulement of the loan dated 17th July 2006. The loan was thereby rescheduled for a period up to October 15, 2008. On repayment it stated:

“The rescheduled Term Loan will be repaid by October 15th 2008, by 10 four-monthly (termly) installments comprising principal and interest, starting from October 15, 2005 and ending on October 15, 2008 --- we attach the schedule of repayment for your records. In this connection we advise having given the schedule in June 2005.

Notwithstanding the provisions above, the Bank shall be entitled to demand and call for immediate repayment of all or any of the secured liabilities at its sole discretion at any time---

In the event of default it provided:-

“ --- all loan outstanding will become due and payment immediately and the arrears shall attract interest at the then applicable ruling rate.”

Annexure B shows that the Rescheduled loan period was up to 15th October, 2008 but that repayment of both principal and interest was by four monthly installments, the first of such installments being due and payable on 15th October 2005. In the event of default all loan outstanding would become due and payable immediately. As of 22nd May 2008, the date of advert for sale, the amount outstanding on the February - May 2008 period was shs11,130,494/= on both principal and interest as per the statement of Account Annexure C. As a result of the default, under the loan agreement (annexure “B”) all loan outstanding became due and payable. The statement, annexure C – shows that the total outstanding as of 4th June 2008, the date of the statement, was Shs32,413,441/=. The Applicant in paragraph 4 (c) of his plaint admits this sum as outstanding, which he; erroneously though, considers as a balance on only interest. It is trite that a party is bound by his/her pleadings. Considering all the above I find that the Applicant has failed to show that he has a prima facie case against the Respondent.

The next issue is whether the Applicant would suffer irreparable injury which an award of damages cannot adequately atone if the injunction was not granted and later the Applicant turned out to be successful in the main suit. The Applicant must show that he has a claim in the main suit which even if awarded damages would not be adequately compensated for the loss he is to

suffer if the injunction is not granted. See Tonny Waswa Vs Joseph Kakoba (1987) HCD 85, Napro Industries Ltd Vs Five Star Industries Ltd & Anor HC Commercial Division) Misc. App. No 773 of 2004

In paragraphs 8 and 9 of his affidavit in supported the Applicant avers:-

“8That if the sale is not forthwith stopped I shall suffer irreparable loss since I have already paid the Bank all the substantial amounts of money as per the contract, my properties shall be sold without being valued by an independent valuer and I therefore stand to lose, and the pending case before court shall be rendered useless.”

9. That already the Respondent’s auctioneers have threatened to bring potential viewers to the site, however the property is comprised of a school Kireka Parents School, and the actions of the auctioneer are likely to affect the day to day administration and running of the school, which shall lead me to incur further loses.”

In Kiyimba – Kagwa Vs Haji Nassar Katende (1988) HCB 43 Odoki J (as he then was) held that irreparable injury means that the injury must be substantial or immaterial one, that is, one that cannot be adequately compensated for in damages.

The Applicant does not in his affidavit show the nature of loss he would suffer. Otherthan stating that the land comprises of a school called Kireka Parents School, the Applicant does not show what injury that would result to him and which cannot be compensated by an award of damages. In his submission the Applicant’s counsel stated that the school was the Applicant’s only source of income and that the Respondent had granted the loan to the Applicant while aware of this fact. Counsel’s submission in his regard was not supported by any evidence on record. Court should not be expected to speculate.

In view of my holding on the first issue, I must point out that the relationship between a bank and its customer is contractual in nature. Monies lent to a customer are repayable either on demand or in the case of term loans, as in this case, at a specified future date. Where the loan is secured

by a mortgage a special property in the mortgaged property passes to the bank in order that it may be able to sell the property if its right to sell arises. In paragraph 12 of its affidavit in reply the Respondent contends that as mortgagee it is empowered to have recourse to the mortgaged property to recover the sums due to it. A mortgagee where he exercises his right to liquidate the debt due by attachment and sell of the security he is under a duty to sell the security and use the proceeds to pay off the loan, accumulated interest and costs of the sale. The mortgagee has a duty to give an accountability to the mortgagor and pay the balance, if any, of the sale proceeds to the mortgagor.

The issue is not how much has been paid on the loan but whether there monies due and payable on the loan as per the loan agreement and a default in payment. In light of all the above I find that the Applicant has failed to show that he will suffer irreparable injury in the event the main suit is decided in his favour when the property has already been sold.

The last test is that in case of doubt court should decide whether or not to grant a temporary injunction on the balance of convenience. This test is resorted to when Court is in doubt on any of the first two issues. Without any doubt my finds on the first two issues have been in the negative. I therefore find no need to consider the issue of convenience.

In the final result this application is dismissed with costs.

Hon. Mr. Justice Lameck N. Mukasa

Judge

26th September, 2008

