THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-MA-337 -2012

(Arising from CIVIL SUIT NO. 66 OF 2012)

KESACON SERVICES LTD::APPLICANT

VERSUS

STANBIC BANK (U) LTD::RESPONDENT

BEFORE HON. LADY JUSTICE HELLEN OBURA

RULING

The applicant company brought this application under Order 41 rules 1, 2, and 9 of the Civil Procedure Rules, Section 98 of the Civil Procedure Act and Section 33, 38 and 39 of the Judicature Act seeking for orders that:

1. *A temporary injunction doth issue to restrain the respondent, its agents, assignees or any person claiming under it from disposing off, selling, auctioning land and developments comprised in Kibuga Block 38 Plot 537 until the determination of Civil Suit No. 66 of 2012.*
2. *The costs of the application be provided for.*

The application is supported by the affidavit of Mr. Assimwe Steven, the applicant's Managing Director. It contains the grounds of the application as follows:

- ***The applicant mortgaged land and developments comprised in Kibuga Block 38 Plot 537.***
- ***A mortgage deed and a loan agreement were executed between the applicant and the respondent wherein the respondent was lent Ug. Shs 600,000,000/=.***
- ***The respondent only advanced Ug. Shs. 476,381,200/=.***
- ***The respondent breached both the loan and mortgage deed terms.***
- ***The mortgage is unenforceable against the applicant.***
- ***The respondent has threatened to sell the property.***
- ***The applicant filed Civil Suit No. 66 of 2012 for declaration that the mortgage is unenforceable and for damages.***
- ***The suit has overwhelming chances of success.***
- ***The applicant shall suffer irreparable loss if the mortgaged property is sold/auctioned.***
- ***Unless the respondent/its agents are restrained by Court Order the mortgaged property shall be sold and the purpose of the suit defeated.***
- ***It is important that the status quo be maintained.***

An affidavit in reply to the application was deposed by Mr. Jamil Mpiima Senoga, the respondent's Legal Officer. He deposed that by a loan facility agreement dated the 20th July 2011 (hereinafter called "the facility agreement") and amended on 10th August 2011 (hereinafter called "the variation agreement") the respondent agreed to advance a loan in the sum of Ug. Shs. 600,000,000/= to the applicant to be secured by land and property comprised in Kibuga Block 38 Plot 537 land at Makerere over which a mortgage in favour of the respondent would be registered to secure the loan sum. A copy of the facility agreement was attached as annexture "Ai" while a copy of the variation agreement was attached as annexture "Aii".

The deponent stated that under the facility agreement the purpose of the loan facility was the refinancing of exposures in Housing Finance Bank and the balance for working capital. He stated that it was a term of the facility agreement that an event of default would occur should the borrower fail to make payment by the due date of any of the amount due in the terms of the loan facility or any other facility that the bank has accorded the borrower or may offer to the borrower. Further that in the event of default, then the full amount of the loan facility shall immediately become due and payable.

He also deposed that under the variation agreement the loan facility would be done in two phases. The first phase would be effected through the bank's appointed lawyers to clear the outstanding loan balance at Housing Finance Bank upon receipt of confirmation from the same bank. The subsequent phase would be effected upon receipt of the certificate of title held as security in the Housing Finance Bank effecting transfer of the said certificate of title to the borrowers name and registration of the mortgage in favour of the respondent.

Mr. Mpiima stated that on 3rd August 2011 Housing Finance Bank at the request of the applicant issued a letter to the respondent advising that the outstanding balance owed by the applicant to them in respect of which the Makerere property was held as security was Ug. Shs. 381,881,998/= A copy of that letter was attached as annexture "B".

He further deposed that on the 22nd August 2011 the respondent through its lawyers M/s Kateera & Kagumire Advocates duly remitted to Housing Finance Bank the sum of Ug. Shs 381,881,998 owed to it and this sum was credited on the 23rd

August 2011. A copy of the letter from the respondent's lawyers was attached as annexture "Ci" while the Housing Finance Bank ledger was attached as "Cii".

Mr. Mpiima deposed that in breach of the facility agreement the applicant diverted and/or dealt with part of the monies remitted to Housing Finance Bank contrary to their contractual loan utilisation by reason of which Housing Finance Bank, contrary to their earlier position, indicated that a further sum of Ug. Shs. 93,796,387/= was payable to it in redemption of the Makerere property. He averred that the accrued interest at the rate of 22% per annum on the Ug. Shs 381,881,98/= over the twenty day period between the 3rd August 2011 when the balance was first advised by Housing Finance Bank and the 23rd August 2011 when the sum owed was credited to Housing Finance Bank account would be Ug. Shs. 4,603,509/= and this would have been the only additional sum payable by way of further accrued interest if the funds earlier remitted had not been partially diverted by the applicant. Copies of the respondent's lawyer's letters to Housing Finance Bank were attached as "Di" and "Dii".

He also stated that in order to protect its position and obtain security over the Makerere property in respect, inter alia, of the monies already advanced the respondent eventually agreed to pay a further Ug. Shs. 94,449,202/= to Housing Finance Bank upon which Housing Finance Bank released to the respondent the title to the Makerere property over which the respondent on the 21st October 2011 duly registered, as Instrument No. KLA 522088. Copies of the mortgage deed and certificate of title for the property were marked "Ei" and "Eii".

The deponent stated that the monthly loan repayment sum payable by the applicant as agreed in clause 3 of the Mortgage deed was Ug. Shs. 17,087,089/= to cover

both principle and interest. The loan having been disbursed on the 17th August 2011, the monthly repayment of the principle and interest began to accrue on the 17th September 2011. The applicant defaulted in payment of each and everyone of the four monthly instalments that fell due on the 17th September, 17th October, 17th November and 17th December 2011 which were events of default and which entitled the respondent to stop any further disbursements of the loan and ultimately to recall the entire loan on 13th January 2012. Copies of the loan ledger indicating the two loan draw downs and of the schedule indicating the continuous defaults in repayment were annexed as “Fi” and “Fii”.

In further reply, Mr. Mpiima deposed that the various sums paid by the applicant in respect of registration of the mortgage and the valuation of Makerere property were due and payable and there is no reason in law for a claim for their refund. He averred that such sums as were debited on the applicant’s account were in respect of amounts due under the facility agreement and were properly made.

It was also stated by the deponent that on 13th June 2012 the suit property was advertised by the respondent for sale and that the respondent is well within its rights to sell the suit property which was duly mortgaged to it. The respondent denied breaching any terms of the mortgage as alleged.

He deposed that the applicant does not have a prima facie case with any probability of success as the underlying suit and the present application are without merit the applicant having been in default of its mortgage obligations and the respondent is at liberty at law to realize the security.

It was averred by the respondent that in any event the applicant will not suffer irreparable injury if the security is sold as the property has a known value and thus the applicant's loss can be monetized. It was added that the respondent has the means to compensate the applicant in damages in the unlikely event that the applicant's suit should succeed.

The applicant filed an affidavit in rejoinder deposed by Assimwe Steven. He denied that the applicant breached the facility agreement and added that the respondent remitted a further sum of Ug. Shs 93,769,387/= to Housing Finance Bank only after being threatened with legal action. A copy of the applicant's letter to that effect was attached as annexture "A" to the affidavit in rejoinder. Mr. Asiimwe stated that the respondent by paying an additional Shs. 93,796,387/= to Housing Finance Bank, was performing its duty under the loan facility.

He also stated that the respondent breached the loan agreement when it refused to pay the balance of working capital and as such the loan agreement was never fulfilled and the mortgage is unenforceable as against the applicant.

It was the applicant's position that the monthly instalments of Ug. Shs. 17,087,089/= was supposed to commence after disbursement of the full loan amount of Ug. Shs. 600,000,000/= which the respondent failed to reimburse. The applicant denied defaulting on repayment of the loan and also denied that any monthly instalments fell due on the 17th September 2011, 17th October 2011, 17th November 2011 and 17th December 2011.

Mr. Assimwe stated that the applicant made numerous demands to the respondent to advance the working capital component of the loan but that the respondent

falsely claimed that it paid and was applied to clear the arrears on the account. Reference was made to annexture “C” and “F” to the affidavit.

He maintained that the respondent has no right to sell the suit property under the unenforceable mortgage and that the respondent breached its statutory obligations by disbursing less amount. He stated that the applicant shall suffer irreparable loss if the mortgaged property is sold since it is a capital asset of the company which it has been using to finance its projects through mortgage financing. Besides, its value cannot be properly ascertained since the open market value would differ from the value attached the property being a capital generating asset.

It was further stated by the deponent that if the mortgaged property is sold the applicant will not have a registered office or place of business which will highly inconvenience the company.

When this application came up for hearing it was argued for the applicant by Mr. Deus Nsengiyunva and for the respondent by Mr. Masembe Kanyerezi together with Mr. David Ssemakula Mukiibi.

Mr. Nsengiyunva argued that the circumstances stated in Order 41 rule 1 of the Civil Procedure Rules were present in the instant case. He reiterated the conditions for grant of a temporary injunction as stated in the case of **Kiyimba Kaggwa vs Katende [1985] HCB 44.**

Counsel for the applicant argued basing on the affidavits in support and in rejoinder that the applicant has a prima facie case with overwhelming chance of success due to the breach of contract by the respondent when it disbursed a less

figure and registered a mortgage of Shs. 600,000,000/=. It was argued that the purpose of the loan was to refinance a loan and also working capital but the bank having obtained the certificate of title from Housing Finance Bank refused to release the working capital.

In addition to that, the other breach complained of was the illegal debiting of the applicant's account at a rate of Shs 17,087,089/= a month later after the first instalment of Shs 381,881,998/= and yet the Shs 17,087,089/= was the instalment agreed upon is Shs 600,000,000/= was all disbursed.

It was argued that on making several demands a response to the applicant contained in annexture "F" indicated that the balance that was to be paid as working capital was applied to clear the arrears on the account. Counsel for the applicant held the view that the amount was never applied to clear the arrears for an amount that was never disbursed. He added that if at all it was advanced to clear the arrears then there would not have been a default since the balance would clear arrears up to 7 months.

The applicant's counsel also argued that the mortgage is unenforceable because it is void for contradicting the facility agreement which provided payment mode in paragraph 1 as 60 equal monthly instalments whereas the mortgage talks about 36 equal monthly instalments at page 2.

On the 2nd condition, Mr. Nsengiyunva argued that the applicant will suffer irreparable loss if the property is sold since it is the capital financing asset of the applicant. He added that the purpose for which it was mortgaged was to raise capital. He referred to the encumbrance page of annexture "B to the affidavit in

rejoinder, showing how the applicant has been using the same to finance its business.

As far as balance of convenience is concerned, counsel for the applicant argued that the property has the applicant's registered place of business and it will be highly inconvenienced if it has to move its place of business to another location or would be rendered homeless.

Counsel for the respondent in opposing the application contended that it should be dismissed for lacking merit. Mr. Masembe submitted on the issue of prima facie case with a probability of success that the case is based on a lending agreement between the parties. These are annextures "Ai" and "Aii" to the affidavit in reply.

He submitted that the money meant to offset the loan with Housing Finance Bank was diverted by the applicant and that this was a dishonest breach that triggered the whole loan to be recalled. He contended that a total of Ug. Shs. 94,449,209/= was diverted and it was not anticipated by the bank that through the applicant's breach there would be an early recall.

He conceded that the monthly instalments of Ug. Shs. 17,087,089/= was based on an amortisation of the loan sum of Shs. 600,000,000/= and not on the sum of Ug. Shs. 473,230,408/=. However he submitted based on annexture "Fii" that at the time the suit was brought the bank's claim was Shs. 470,241,969/= implying that the bank is only claiming what it disbursed and not any monthly instalments as alleged. This amount was arrived at by adding the first drawdown of Shs. 381,881,998/= as per annexture "F1" and the second drawdown of Shs. 94,4449,202/= leading to a debit balance of Shs. 475,130,727/=. With some

recoveries of interest the total indebtedness was reduced to Shs. 470,241,969/= which is now claimed.

Mr. Masembe also submitted that by reason of the diversion of a substantial proportion of the loan by the applicant and by reason also of the failure by the applicant to have paid any of the loan instalments based on the lesser sum of Shs. 475,130,727/= which is indicated on annexture "Fii", the bank was entitled to recall the loan in accordance with the contractual provision in clause 13.1.1.

He argued that while there was default in repayment, the real reason for recall was dishonesty as the relationship of banks to their customers is based on trust. He added that since the applicant has not made any payments, it has not come to court with clean hands. In his opinion, the applicant has no prima facie case with a possibility of success.

With regard to irreparable injury, citing the case of **Herbert Kabunga Traders v Stanbic Bank (U) Ltd MA 159 of 2012,** Mr. Masembe submitted that the applicant's property has a known value which if sold and the applicant becomes successful in the main suit, the respondent can pay the damages.

In addition to that counsel for the respondent submitted that the applicant's failure to pay has removed him from the equitable remedy and thus irreparable damage has not been made out. He referred to the case of **Maithya v Housing Finance Company of Kenya and Another [2003] 1 EA 133.**

In response to the contention that the mortgage deed is unenforceable as being void because it talks of Shs. 600,000,000/= as advanced, counsel for the respondent

referred to clause 2 of the mortgage deed and submitted that while the mortgage talks of Shs. 600,000,000/= as per the facility letter; its enforcement is for the amount that was advanced. He argued that mortgages are usually enforced for what is owed and that does not make them void. In his view the difference in the number of monthly instalments does not make the mortgage void.

In a brief submission in rejoinder, Mr. Nsengiyunva argued that the applicant was not dishonest. He explained that money was deposited in the applicant's current account which he was operating but which also had funds other than what the respondent deposited. His argument was that there was no dishonesty as the applicant had the right to utilise his money. He maintained that the case for the applicant was the working capital which was never paid.

On irreparable loss, counsel for the applicant submitted that the property was for financing the business and the applicant has no obligation to pay up any money when the entire loan sum is not disbursed. He argued that the relationship between the bank and customer is contractual. He submitted that there is no contract for payment of Shs. 470,000,000/= and no mode of how it would be paid in which case there cannot be default.

It is now a settled principle of law that the purpose of a temporary injunction is to preserve matters in status quo until questions to be investigated in the suit can be finally disposed of. See **Kiyimba Kaggwa v Abdu Nasser Katende (supra)**. It is not in dispute that the status quo in this case has not changed because the sale of the suit property has not yet taken place. It was preserved by an interim order issued by this court pending determination of this application.

The grant of a temporary injunction is an exercise of judicial discretion and no appellate court will interferer unless it is shown that the discretion has not been exercised judicially. See **Giella v Cassman Brown and Company Ltd [1973] EA 358** as per Spry VP at page 360 and **Kiyimba Kaggwa v Abdu Nasser Katende (supra).**

The conditions for grant of an interlocutory injunction as set out by Spry VP in the leading case of **Geilla v Cassman Brown and Co. Ltd (supra)** are that;

(1) An applicant must show a prima facie case with a probability of success;
(2) An interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated for by damages;
(3) If the court is in doubt, it will decide the application on a balance of convenience.

In light of these conditions the applicant is required to show that it has a prima facie case with a probability of success. However, this court is mindful of the dictum of Lord Diplock in the case of **American Cynamide Co. v Ethicon [1975] 1 ALL E.R. 504** to the effect that for purposes of grant of a temporary injunction it is sufficient for the applicant to prove that triable issues have arisen that merit judicial consideration. There is no requirement for the plaintiff to establish a strong prima facie case. All the plaintiff needs to show by his action is that there are serious questions to be tried and the action is not frivolous or vexatious.

It is the applicant's case that it has a prima facie case with a probability of success based on two main reasons. The first one is the alleged respondent's breach of the

facility agreement by failing to disburse the agreed sum and secondly, a void mortgage. The applicant also complained that the respondent debited its account at a rate of Shs. 17,087,089/= after the first instalment of Shs. 381,881,998/= and yet the Shs. 17,087,089/= was the instalment agreed upon if Shs. 600,000,000/= was all disbursed.

On the other hand, the respondent justified its failure to disburse the total sum agreed upon. It was argued that the applicant committed breach of trust when it diverted the amount paid into its bank account with Housing Finance Bank for refinancing its exposure with that bank as had been agreed in the loan facility agreement.

I have carefully perused at the facility agreement, mortgage and variation letter (annextures “C”, “D” and “E” to the affidavit in support of the application) which indicate the terms of the loan facility. I have also perused the plaint filed by the applicant in the main suit. The facility agreement signed by the parties and later varied clearly stated the purpose of the loan and how it was to be disbursed. According to the variation letter, the drawdown under the loan facility would be done in phases. The first phase was to clear the outstanding loan balance at Housing Finance Bank and the subsequent phases were to be paid upon receipt of certificate of title held as security in Housing Finance Bank, effecting transfer of the said title to the borrowers name and registration of a mortgage in favour of the respondent bank.

On 25th July 2011 the respondent wrote annexture “F” to the affidavit in support to Housing Finance Bank to the effect that it had approved facilities for the applicant to be utilised in settlement of its exposures with Housing Finance Bank. It

requested to be provided with all the applicant's exposures with Housing Finance Bank whether actual or contingent and confirmation that when the exposures are settled the securities would be released to the respondent free on any encumbrances.

On 3rd August 2011 Housing Finance Bank advised the respondent vide annexture "B" to the affidavit in reply that the outstanding balance owed by the applicant was Ug. Shs. 381,881,998/= which continued to accrue interest on a daily basis at a rate of 22% per annum. That sum of money was remitted to Housing Finance Bank on the 22nd August 2011 by the respondent's lawyers, as per annextures "Ci" and "Cii" to the affidavit in reply and was credited on the applicant's current account on 23rd August 2011.

According to the bank statement of the applicant's current account marked annexture "Cii" to the affidavit in reply, upon that money being credited on the account, a total of Shs. 39,702,078.8/= was transferred to account number 01379602048 as loan settlement in four separate transactions made on 25th August 2011. That loan account belongs to the applicant as advised by Housing Finance Bank in annexture "B" to the affidavit in reply.

A close scrutiny of that bank statement shows that this was a very active account where the applicant's officials were depositing and withdrawing money, I believe in the normal course of their business. It is pertinent to highlight some transactions on that account to exemplify this point.

Between 8th August 2011 and 23rd August 2011 when the money in dispute was credited on that account, there were a total of four credits and four debits

attributable to the applicant. As on the date the respondent transferred money to that account there was only a small balance of Shs. 32,000/=.

However, on 25th and 27th August 2011 just a few days after the money was credited on the account, there were two withdrawals of Shs. 3,000,000/= each. On 27th August 2011 Shs. 980,000/= was deposited on the account and on 28th August 2011 there were two withdrawals of Shs. 36,000,000/= and Shs. 26,000,000/= each.

On 29th and 31st August 2011, cash deposits of Shs. 58,740,000/= and Shs. 3,382,500/= were made on the account. Subsequently, there were several withdrawals and deposits. Housing Finance Bank also made further transfers to the applicant's loan account to the tune of Shs. 59,441,187/= inclusive of the earlier transfers of 25th August 2011. It is therefore not true that the shortfall was solely caused by the applicant's withdrawals.

It was when those transactions were going on that Housing Finance Bank refused to release the securities to the respondent contending that there was a further sum of Ug. Shs 93,796,387/= that was payable. This was contested by the respondent's lawyers although the money was eventually paid to release the security. While the respondent contends that the applicant breached the facility agreement by diverting part of the monies remitted to Housing Finance Bank, the applicant in response argues that by paying the additional sum the respondent was performing its duty under the loan facility agreement.

I have deliberately highlighted the transactions on the applicant's current account so as to put the arguments of both parties in the proper perspective. The question

that this court needs to address is whether the applicant indeed dishonestly diverted money from its current account as alleged by the respondent to justify its refusal to disburse the agreed sum of money to the applicant. If that question is answered in the affirmative then the respondent's argument that the applicant could not be entrusted with more money would in my view be convincing because as rightly observed by counsel for the respondent, banks operate on the basis of good faith. On the other hand, if it is answered in the negative, then in my view there would be no justification for the respondent's refusal to disburse the money as agreed.

However, I must observe at this juncture that I have found some difficulty in comprehending why the money that was supposed to settle a loan facility was left on the applicant's current account at its disposal. One would have expected the entire sum of money to be immediately transferred to the applicant's loan account instead of the piecemeal transfers indicated on the bank statement. I cannot say much on this issue because Housing Finance Bank is not a party to this suit but to my mind the respondent should have raised this matter with it instead of blaming the applicant and unilaterally refusing to disburse the balance on the loan.

In the above circumstances, could the applicant be accused of dishonesty by continuing to operate its current account through deposits and withdrawals of money? I believe in all fairness it would not. In my view there is no evidence before this court to impute dishonesty on the part of the applicant. If perhaps the applicant had stopped operating this account and resumed after the money was deposited or was just withdrawing without making any deposits one would say there was dishonesty that could cause the bank to lose trust in it.

It is also interesting to note that while the respondent was not willing to disburse the agreed loan sum to the applicant, it went ahead to register a mortgage basing on that amount as if it had been fully disbursed. By a letter dated 1st February 2012, the respondent informed the applicant that the balance due was applied to clear the arrears on the account.

When this matter was raised by the applicant in this application it was contended for the respondent that what was being claimed was the actual amount disbursed which does not include that balance. I do find a problem with the manner in which the respondent handled this transaction. It could have done it better by being more transparent to the applicant. It chose to use its stronger position to recall the loan prematurely instead of sorting out the issue of disbursements. That was an overreaction which was uncalled for given the facts and circumstances highlighted above.

For the above reason, I am not quite convinced at this stage about the respondent's reason for refusing to disburse the sum of money agreed upon in the loan agreement which was consideration for the mortgage. In any case, proof of dishonesty may require additional evidence than what was produced by way of affidavit in this application. It would therefore be in the best interest of both parties for the main suit to go for trial so that all the issues are properly adjudicated upon.

It is my view that the authorities of **Maithya v Housing Finance Company of Kenya and Another (supra)** and **Herbert Kabunga Traders v Stanbic Bank (U) Ltd** (supra) are distinguishable from the facts of this case in so far as they relate to a prima facie case and coming to the court of equity with clean hands.

The basis for stating that there was no prima-facie case in the case of **Herbert Kabunga Traders v Stanbic Bank (U) Ltd** (supra) was that the alleged illegality was actually contractual. This court also held that the applicant had not come to court with clean hands because it had not paid the agreed instalments. Unlike in this case, the respondent in that case had fulfilled its obligations of disbursing the money under the loan agreement.

In the instant case however, the agreed amount was not fully advanced and yet the monthly instalments were based on the total sum. It would therefore be unjust and unfair to expect the applicant to pay the instalments that were based on the sum not advanced. Besides, it was specifically stated in clause 2 of the facility agreement that the loan was for refinancing the applicant's exposures and the balance was for working capital. The respondent's failure to advance the component for working capital could have affected its business and capacity to raise the required instalments. I believe that is why the applicant claimed for damages for loss of business and income in the main suit. For that reason, this court does not agree that the applicant has not come to court with clean hands.

In the circumstances, I find that the applicant's case raise some triable issues in breach of contract that merit preserving the status quo so that the suit is not rendered nugatory. This application would succeed on this ground alone without considering the arguments on validity of the mortgage which in my view is not very convincing.

I also do not find it necessary to consider the other conditions for grant of a temporary injunction but I need to mention in passing that as regards the 2nd condition, there is no irreparable injury that the applicant would suffer which

cannot be atoned by an award of damages if the temporary injunction is not granted and the applicant's property is sold. I agree with counsel for the respondent that the property has a known value which if sold and the applicant becomes successful in the main suit, the loss can be quantified and the respondent would be in a position to pay the damages.

In the premises, this application would fail to meet the second condition and if this court had not made a finding that there are triable issues it would fail. However, due to that finding on the first condition, I am of the considered opinion that the balance of convenience favours preserving the status quo so that the issues raised by the applicant are tried on their merits.

In the result, the orders sought in this application are granted and costs shall be in the main cause.

I so order.

Dated this 8th day of February 2013-02-08

Hellen Obura

JUDGE

Ruling read in chambers at 3.00 pm in the presence of Mr. Deus Nsengiyunva for the applicant whose General Manager Mr. Kisembo Emmannuel was also present. Mr. Ssemakula Mukiibi appeared for the respondent.

JUDGE

08/02/13