

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

HCMA NO 913 OF 2015

ARISING FROM HCCS NO 721 OF 2015

- 1. G.S. ROYAL HARDWARE AND INDUSTRIES LTD}**
2. EKWONG WILLIAM}.....APPLICANTS

VS

- 1. EQUITY BANK (U) LTD}**
2. MURAMUZI ENTERPRISES AND AUCTIONEERS}.....RESPONDENTS

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicants who are also the Plaintiffs in the main suit commenced proceedings against the Defendants jointly and severally for declarations that the intended sale of the second Plaintiff's property by the Defendants comprised in Kyadondo block 222 plot 1650 land at Namugongo with residential house mortgaged as security to the first Defendant is unlawful; a declaration that the first Defendant instructing the second Defendant to sell the second Plaintiff's property are illegal, unfair and unjust and a breach of loan and mortgage agreements which entitled the first Plaintiff to indemnity and declaration that the foreclosure process is illegal and intended to cause loss to the Plaintiffs. The Plaintiff further seeks orders for a right of redemption, temporary injunction, general damages and costs of the suit against the Defendants.

Subsequently the Plaintiffs filed this application by chamber summons under the provisions of Order 41 rules 1, 2, 3 and 9 of the Civil Procedure Rules seeking an order for a temporary injunction to issue restraining the Respondents, their agents/servants or any other party from the sale of/foreclosure proceedings in respect of the mortgaged suit property comprised in Kyadondo

Block 222 plot 1650 land at Namugongo developed with a residential house pending disposal of HCCS 721 of 2015.

The grounds of the application are that the Applicant's commenced HCCS No. 71 of 2015 as stated above. Secondly the Applicant will suffer irreparable damage if this application is not granted as the loan facility involves colossal sums of money of which the same is being promptly service but for the pre-mature foreclosure proceedings against the Applicants on security in the form of the land comprised in Kyadondo block 222 plot 1650 land at Namugongo in the names of the second Applicant and the developed with a residential house. Thirdly the Respondent's foreclosure process and threatened eviction and sale of the Applicant's property are illegal and unjust and no statutory notices were served on the Applicants as required by the law. Fourthly the first Respondent has failed or refused or manipulated the Applicant's loan account and repayment accounts which has not rendered the status of the loan and arrears thereof against Sekum General Hard Wares Ltd pursuant to a tripartite agreement. Fifthly the Applicants have fully repaid to the first Respondent all the amounts due and owing on the mortgage and the said Sekum General Hard Wares Ltd is not in arrears or at all and no loan statements of been rendered to the Applicant to confirm deposits which he believes is not in arrears. Finally the Applicants aver that the balance of convenience is in favour of the Applicant as the Respondent will not be inconvenienced in anyway and the application if granted would not prejudice the Respondent at all. It is just and equitable that the application is granted.

At the hearing of the application Mr Aggrey Mpora represented the first and second Applicants while Dennis Kimanje represented the first and second Respondents.

Mr Dennis proposed that the Applicant deposits 50% of the outstanding amount under the mortgage regulations. The Applicants Counsel informed court that the Applicant does not intend to deposit 50% of the outstanding amount. An interim order was issued by the registrar stopping the sale and extended by court with the consent of Counsels pending the ruling in this application.

The court was addressed in written submissions.

The Applicant's Counsel filed written submissions on 10 February 2016 and also filed additional submissions on 12 February 2016. The first submissions comprised of five pages of typescript while the second submission comprised two pages of typescript. On the other hand the Respondent filed submissions on 22 February 2016 comprising six pages and also filed further submissions on 22 February 2016 comprising an additional two pages. The rejoinder of the Applicant comprises seven pages. On 3 February 2016 the court gave timelines for the filing of written submissions. Furthermore written submissions in the main were supposed to be confined to not more than seven pages each and three pages in rejoinder. Timelines can be prescribed by the presiding judge in a commercial cause filed at the Commercial Division of the High Court under Direction 6 of the Constitution (Commercial Division) (Practice) Directions 1996. Timelines and directions are supposed to be strictly adhered to. Both Counsels breached the court directions as to the number of pages and timelines. The further submissions of the Applicant were filed two days after the timelines prescribed or ordered by the court. Secondly the Applicants Counsel exceeded the number of pages in the rejoinder by four pages. The Respondent's Counsel on the other hand exceeded the number of pages by two pages.

That notwithstanding the Applicant's Counsel objected to the affidavit in reply in the further submissions filed on 12 February 2016 on the ground that it was filed out of time on 22 December 2015 by one month and 17 days after the Respondents were served with the application on 5 November 2015. He relied on authorities of this court applying Order 12 rule 3 (2) of the Civil Procedure Rules that a reply shall be filed within 15 days after service of the application. The Respondent on the other hand in the additional submissions submitted that the objection was raised as an afterthought and prayed that it is overruled. He prayed that the affidavit in reply is instead validated.

The objection was belated and relies on a procedural irregularity which has not caused any prejudice to the Respondent in that the Applicant filed an affidavit in reply to the Respondent's affidavit in reply on 2 February 2012. An objection of this nature ought to be raised at the very first opportunity. Because the Applicant did file an affidavit in rejoinder to the reply of the Respondent, no prejudice has been occasioned to the Applicant and the affidavit in reply is validated and time extended accordingly for having it filed out of time so that it is filed on 22

December 2015 under the provisions of Order 51 rules 6 of the Civil Procedure Rules. The above cited rules 6 gives this court power to enlarge time prescribed by the rules or by the court with costs to be borne by the Applicant. Costs of the application to enlarge time shall be borne by the Respondent in any event.

On the merits of the application, the Applicant's Counsel submitted that the Applicant's case inter alia is that the first Applicant's credit facility secured by the second Applicant's property was paid off according to the statement of account. Through a tripartite agreement scheme of the first Respondent to hide monies illegally disbursed without the Applicant knowledge or consent on 23 January 2014 an amount of Uganda shillings 100,000,000/= was disbursed in breach of the mortgage agreements and which illegal disbursement the Applicant unknowingly serviced in full. The Respondent is continuing to illegally hold the Applicant's property hence the filing of the suit.

The Applicant's Counsel contends that the Respondent bank coerced the Applicant into execution of a tripartite agreement and it amounted to an unconscionable bargain and a well orchestrated scheme to hide the illegal transaction from the Applicants. The first Respondent bank took advantage of the second Applicant's lack of knowledge to manipulate him into signing the impugned tripartite agreement and the improper advantage amounted to an equitable fraud to hide an illegality which cannot be condoned by this court.

Counsel submitted that the Applicant has a prima facie case with a probability of success.

Secondly Counsel submitted that the circumstances warrant the grant of a temporary injunction because the second Applicant will suffer irreparable injury if the injunction is not granted as the suit property is a family home and it is the Applicant's contention that they do not owe the first Respondent. The property was being illegally held by the first Respondent and the Applicants are entitled to damages and restitution as a result of the illegal disbursement that was fully serviced by the Applicants. He submitted that irreparable injury does not mean that there must be physical possibility of repairing injury but means that the injury must be a substantial or material one that is one that cannot be adequately compensated for in damages (see **Kiyimba Kaggwa versus Hajji Katende [1985] HCB 45**). Counsel further invited the court to consider the case of **Grace**

Bamurangye Bororoza and 53 Others versus Dr Kasirivu Atwooki and 53 others Civil Application No 44 of 2008 (2008 [HCB] 91). It was held in that case that in order to succeed in an application for an injunction one must satisfy the court that if the order of injunction is not granted, then one will suffer irreversible damage that cannot be addressed by money compensation. Counsel contended that the second Applicant does not have an alternative home for his family and will suffer psychological torture if thrown out into the streets by the Respondent.

Furthermore Counsel submitted that the balance of convenience favoured the Applicants. He prayed that the court should weigh the convenience of complying with the injunction on the part of the Respondents against the damage that the Applicants would suffer if the injunction is not granted. If the damage outweighs the inconvenience, the Applicants should be granted the injunction. The second Applicant and his family are resident in the property and the Respondent would not be inconvenienced in anyway and this application if granted would not prejudice the Respondent at all and she can be compensated by an award of damages. Moreover the second Applicants/Plaintiffs case is that the Applicants have always been ready to redeem the property but the first Respondent was only interested in selling the Applicants property. This is by the first Respondent orchestrating the tripartite agreement to hide monies illegally disbursed and continually denied the second Applicant his right of redemption of the property.

Finally relying on the case of **Janmohamad versus Kassamali Virji Madhani [1953] 20 EACA 8** the purpose of a temporary injunction is to maintain the status quo until the question to be investigated in the suit can be finally disposed of. In **Godfrey Sekitoleko and four others versus Seezi Peter Mutabazi and two others [2001 – 2005] HCB volume 3** it was held by the Court of Appeal that the purpose of a temporary injunction is the protection of legal rights pending litigation.

Reply of the Respondent's Counsel

The Respondent's Counsel relies on the facts set out in the Application and facts also contained in the affidavit in reply together with the documents attached thereto. He agreed that the Plaintiffs in the suit are contesting one of the disbursements that occurred on 23 January 2014.

There was a default in the repayment of the facility and as a result the first Respondent bank commenced foreclosure proceedings whereupon the Applicant in a bid to redeem the mortgaged property entered into an arrangement with another company Sekum General Hardware Ltd and the first Plaintiff's indebtedness was cleared. However the new company defaulted on the repayment of the facility and the bank moved to realise the security and served the relevant notices on the defaulter. The advertisement publishing the intended sale was run on 9 September 2015 and the sale was supposed to take place on 10 October 2015. The Plaintiffs commenced the current proceedings challenging transactions under the first contract between the Plaintiffs and the bank which was performed and closed. The foreclosure process is pursuant to the second contract between the bank and Sekum General Hardware Ltd.

In the premises the Respondent's Counsel submitted that the application is misconceived because the first Respondent bank has no enforceable relationship with the Applicants in the mortgage dated 9 April 2013 and contract with GS Royal Hardware and industries Ltd who is the first Plaintiff. Instead the bank is enforcing the mortgage arising out of the 1st of April 2015 contract with Sekum General Hardware Ltd which contract is not under contention.

The rationale for a temporary injunction is to maintain the status quo and Counsel agreed with the authorities cited inclusive of the case of **Rebecca Matovu versus Standard Chartered bank (U) Ltd and another HCMA for 56 of 2012** that the court should be satisfied that there are serious questions to be tried. The material availed to court at the hearing of the application must disclose that the Plaintiff has a real prospect of succeeding in his claim for a permanent injunction at the trial. He contended that the Plaintiffs are likely to succeed in the claim for a permanent injunction because they are seeking to block the foreclosure process arising out of another contract between the bank and another company who is the principal and with the second Plaintiff as the mortgagor. The contract is not the subject of the suit and Sekum General Hardware Ltd is not a party to the suit. In any case the Applicants are not indebted to the bank.

Secondly Counsel added that the Applicants claim that Uganda shillings 100,000,000/= was given to one of the first Plaintiffs directors who used it for himself is untenable. The bank dealt with the first Plaintiff Company and not its directors and money was requested for by the company and disbursed to the company's bank account. By endorsing cheques by which the

money was withdrawn, the second Applicant authorised his co-director to withdraw the money from the company account. The attempt to argue equitable fraud is not supported by the pleading of fraud in the plaint and cannot be argued in this application. In conclusion it is contended that the Plaintiff's case has no prospect of success.

In the case of **Kakooza Abdullah versus Stanbic Bank Uganda Limited HCMA 614 of 2012** the court held that the sale of the mortgaged property pledged as security for a loan agreement or mortgage cannot lead to irreparable loss because it is the contractual arrangement or intention of the parties and is expressly provided for in the loan agreement or mortgage. In the case of **Savours Int (U) Ltd versus DFCU bank Ltd HCM a 283 of 2002** Hon Justice Okumu Wengi held that the court should not grant an injunction to restrain a mortgagee from exercising his statutory powers of sale.

He further submitted that the balance of convenience favours the bank's business pursuant to the Financial Institutions Act 2004. The bank accepted deposits which it lends out to persons like the Plaintiffs. Failure by the borrower to pay in time directly affects the nature of the business of the bank because the depositors' funds must be readily available on demand. The bank is supervised by the bank of Uganda and this required under rule 11 of the Financial Institutions (Credit Classification and Provisioning) Regulations statutory instrument 43 of 2005 to make provisions whenever the borrower fails to repay the debt. The bank takes part of its profits or where there are no profits then its capital to make provisions for a non-performing debt. These provisions have the effect of depleting the capital of the bank and once the capital falls below the legal minimum, the bank would be undercapitalised which could lead to the withdrawal of its licence.

The proposed sale to realise Uganda shillings 188,625,812/= due to take place on 10 October 2015 was stopped by an interim order that was granted at the instance of the Applicants. The bank therefore has to make provision in accordance with the law. In addition to the amount lent the bank took out another sum out of its coffers to make provision thereby occasioning financial loss. The balance of convenience is in favour of the Respondent bank and the application ought to be dismissed with costs.

The Respondent's Counsel further addressed the court on the provisions of the mortgage regulations requiring an Applicant interested in stopping the sale of the mortgaged property to pay 30% or 50% of the outstanding balance. Under regulation 13 (4) of the Mortgage Regulations 2012 50% deposit of the forced sale value or the outstanding amount is to be deposited if the sale is to be adjourned or stopped. Counsel relied on the recent decision of this court in the case of **Miao Huaxian vs. Crane Bank Ltd and Another HCMA 935 of 2015** where the mortgage regulations were applied.

The Applicant further filed detailed submissions in rejoinder amounting to 7 pages of typescript contrary to the directions of this court for the rejoinder to be restricted to 3 pages.

He reiterated the principles for the grant of a temporary injunction which include the disclosure of a prima facie case or serious questions to be tried. He contended that the mortgage the bank is seeking to enforce is the consequence of an illegal disbursement and the suit property belonging to the second Applicant is in danger of being disposed of as a consequence thereof.

Secondly Counsel submitted that it is not true that the first Respondent dealt with the first Applicant Company and reiterated submissions that the first Respondent dealt with one of the directors of the first Applicant as there was no resolution, powers of attorney or any other document at all executed between the first Respondent and the first Applicant as required by the law and any monies disbursed were supposed to be paid direct to the suppliers of the first Applicant in accordance with the agreement but this was not the case where Uganda shillings 100,000,000/= was disbursed on 23 January 2014 rendering the whole transaction illegal and as such the first Applicant's illegal actions cannot go unpunished.

On the submission that the endorsement of the second Applicant on the cheques was authorisation to withdraw the sum of Uganda shillings 100,000,000/= which is in issue, this is an outrageous claim as the second Applicant has never at any material time endorsed cheques to withdraw Uganda shillings 100,000,000/=. Besides the second Applicant always endorsed cheques on the company account for monies which were always there from the suppliers and monies from earlier disbursements and the particulars of breach and failure of the first Respondent in this duties as a bank to its customer are clearly spelt out in the plaint.

He further contended that the Applicant's are not in court to buy time but on account of illegality and violation of rights leading to potential risk to the second Applicant's property. The principle in the case of **Kakooza Abdullah versus Stanbic Bank** are distinguishable because the mortgage transaction in question is the consequence of an illegal transaction that the first Applicant serviced while the first Respondent refused or neglected to avail account statements to the first Applicant.

On the question of whether there would be irreparable damage which cannot be atoned for by an award of damages, Counsel reiterated submissions that the property at stake is a matrimonial home in which the second Applicant resides with his family.

With regard to the balance of convenience, it favours the Applicant and not the first Respondent because the second Applicant is in physical possession of the suit property which is a matrimonial home. Counsel further submitted that the first Respondent's acts are contrary to the Financial Institutions Act 2004 and instead the Bank of Uganda should take stern action on such a bank which acted contrary to banking laws and company laws. He submitted that had the first Respondent followed the law and performed its duty by not disbursing the Uganda shillings 100,000,000/=, the Applicants would not have been in the current state of affairs. The Applicants were duped into executing a tripartite agreement with Sekum General Hardware Ltd whose true intention is best known to them. As to the first Applicant it was religiously servicing the loan before the tripartite agreement was imposed.

Regarding the Mortgage Regulations 2012 and the authorities relied upon do not apply and are distinguishable because the case involves an illegality which must be tried. He relied on the cases of **Latigo Samuel versus Arinaitwe Joseph Bryan and Centenary Rural Development Bank Ltd HCMA 248 of 2013** and the case of **Hebert versus Housing Finance Limited HCMA 923 of 2010** where injunctions were granted without deposit of 30% on account of allegations of fraud. Counsel further relies on the case of **Nakayaga versus FINA Bank Ltd and another HCMA 471 of 2014** where Honourable Lady Justice Helen Obura held inter alia that the requirement for payment of security under regulation 13 (1) of the Mortgage Regulations 2012 applies where the court for reasonable cause adjourns a sale by public auction to a specified date and time and it presupposes that the mortgagees rights to foreclose is not in dispute.

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maXimum728securityx 2016 style*

The Respondent's Counsel invited the court to decline to make an order for the deposit of 30 or 50% security because the suit is basically premised on an illegal transaction of the 23rd of January 2014 and second Applicant's property is in danger of being foreclosed. Furthermore the foreclosure is the result of the first Respondent's action of disbursing Uganda shillings 100,000,000/- in cahoots with just one director of the first Applicant and without any documentation whatsoever contrary to company laws, Mortgage Act, and contrary to the revolving credit facility arrangement and agreement whereby moneys were supposed to be disbursed to the suppliers direct which was not the case with the questioned disbursement. Furthermore the second Applicant's property is now the subject of a tripartite agreement which was orchestrated by the first Respondent solely to put the illegal transaction under wraps as the Applicant was not in default at the time it was executed ostensibly in an effort of the first Respondent to cover up an illegality.

Ruling

I have carefully considered the written submissions and authorities cited as well as the application and evidence contained in the affidavits for and against the application.

As set out above the grounds of the application are that the Applicants commenced HCCS No 71 of 2015 against the Respondents. Secondly it is averred that the Applicant will suffer irreparable damage if this application is not granted as the loan facility involves colossal sums of money of which the same is being promptly serviced but for the pre-mature foreclosure proceedings against the Applicants on security in the form of the land comprised in Kyadondo block 222 plot 1650 land at Namugongo in the names of the second Applicant and with the development of a residential house. Thirdly the Respondent's foreclosure process and threatened eviction and sale of the Applicant's property are illegal and unjust as no statutory notices were served on the Applicants as required by the law. Fourthly the first Respondent has failed or refused or manipulated the Applicant's loan account and repayment accounts and which has not rendered the status of the loan and arrears thereof against Sekum General Hard Wares Ltd pursuant to a tripartite agreement. Fifthly the Applicants have fully repaid to the first Respondent all the amounts due and owing on the mortgage and the said Sekum General Hard Wares Ltd is not in arrears or at all and no loan statements have been rendered to the Applicant to confirm deposits

and he believes it is not in arrears. Finally the Applicants aver that the balance of convenience is in favour of the Applicant as the Respondent will not be inconvenienced in anyway and the application if granted would not prejudice the Respondent at all. It is just and equitable that the application is granted.

The application is supported by the affidavit of Mr Ekwong William, the second Applicant and director of the first Applicant. He verifies the facts disclosed in the chamber summons on oath and deposed that High Court Civil Suit No. 721 of 2015 had been filed against the Respondents. Secondly the first Applicant carries on the business of hardware supply and trade in related commodities, in Uganda, South Sudan and importation of goods into both countries. The first Applicant obtained a loan/mortgage facility from the first Respondent/Defendant. It was an overdraft facility for one year of Uganda shillings 40,000,000/= on 29 April 2013 and a loan disbursement of Uganda shillings 100,000,000/= on the 5th of May 2013 respectively on a local purchase revolving loan arrangement and the facility was secured by the property of the second Applicant, the subject matter of the suit. On 23 January 2013 without any notice and authority Uganda shillings 100,000,000/= was credited on the first Plaintiffs account as a disbursement credit. Between the month of January 2014 and November 2013 the first Applicant/Plaintiff religiously refinanced her loan facility with the first Respondent/Defendant save for a few defaults whose cause was duly and formally explained to the first Respondent/Defendant and the first Applicant/Plaintiff on 24 November 2014 requested for a reschedule and mortgage refinance which the first Respondent/Defendant accepted and executed. They also caused the revaluation of the mortgaged property on 18 November 2014 and the refinance was done on 30 December 2014 for a total of Uganda shillings 125,279,312.85/= clearing the balance outstanding to nil. On 19 January 2015 while the Applicant/Plaintiff had been servicing the loan facility with the first Applicant/Plaintiff and in disregard of the state of affairs at the material time, the second Respondent/Defendant threatened to sell the second Applicant's property. The sale was only prevented by the first Applicant's letter dated 29th of January 2015. While the Plaintiff was still religiously servicing a credit facility with the first Respondent/Defendant, the first Respondent/Defendant for reasons best known to them approached the first Applicant/Plaintiff with an idea of a tripartite mortgage agreement to be executed between the Plaintiff, the Bank and a company known as Sekum General Hard Wares Ltd where Uganda shillings

102,000,000/= is to be transferred on the first Applicant/Plaintiffs account on drawdown to pay off the loan and leaving a balance of Uganda shillings 78,000,000/= to the said company and secured by the second Applicants property on 13th of April 2015

The First Applicant/Plaintiff discovered that on 25 August 2015, the first Respondent/Defendant wrote a notice of sale of mortgaged property to the said Sekum General Hard Wares Ltd to sell the suit property belonging to the second Applicant despite their account statements showing that they have been religiously servicing the loan and are not in arrears at all. The notice was followed by a demand from the second Respondent/Defendants dated 7th of September 2015 and a notice of sale in the Daily Monitor Newspaper dated 9th of September 2015 respectively to the Plaintiff's shock. Furthermore the second Applicant discovered that the first Defendant issued a notice of default dated 14th of October 2015 on the said Sekum General Hard Wares Ltd for Uganda shillings 4,318,084/=. The first Respondent/Defendant has unfairly and unjustly rejected any proposals and attempts to meet and put the record straight as the Sekum General Hard Wares Ltd is not in default of payment at all or even in arrears and the action of the Respondents are premature and illegal. The first Respondent wrongly and illegally consolidated loan amounts through tacking and the said tripartite agreement in an attempt to hide the said illegal credit disbursement of Uganda shillings 100,000,000/= of 23 January 2014 made without authority or consent of the second Applicant. The consent was withdrawn by the other director in the first Applicant. The first Respondent refused to give a hearing to the Applicant's with regard to the second Respondent's unjustified threats of sale of the suit property and it greatly prejudices and hinders the interest of the deponent in the suit property. The first Applicant will suffer irreparable damage if the application is not granted as the loan facility involves colossal sums of money and the same was being properly serviced. The first Applicant has fully repaid to the first Respondent all the amounts due and owing under the mortgage accounts and the said Sekum General Hard Wares Ltd is not in arrears and no loan statements have been rendered to the Applicants to confirm deposits.

The affidavit in reply to the application is that of Mr Arocha Joseph, an advocate of the High Court and a legal officer in the first Respondent. His deposition to the facts in reply are that he agrees that the first Applicant was granted credit facilities by the first Respondent and which

facility was secured by the suit property. Furthermore it was a revolving LPO loan facility with a limit of Uganda shillings 100,000,000/= for a term of one year. The first Applicant would be advanced credit to the limit of Uganda shillings 100,000,000/= once it presented a local purchase order within the given period of one year. On 23 January 2014 the first Applicant was granted credit disbursement of Uganda shillings 100,000,000/= after presentation of a local purchase order according to the cover letter to that effect and the offer letter dated 9th of April 2013. The second Applicant authorised and withdrew the money from the first Applicant's account. The first Applicant's credit facility was paid off on 13 April 2015. Following negotiations between the first Applicant and Sekum General Hard Wares Ltd, the latter applied for and was granted a credit facility by the first Respondent which was secured by the second Applicant's property, the subject matter of the suit. The purpose of the facility was for working capital for various local purchase orders and refinancing the exposure of the first Applicant. Monthly instalments under the facility was Uganda shillings 4,001,751/= until repayment of the loan in full. The said firm defaulted on their loan repayment obligations which prompted the first Respondent to issue demand notices. It continued to be in default of the loan repayment obligations which prompted the first Respondent to issue a demand notice dated 14th of October 2015. Sekum General Hard Wares Ltd has not rectified the default. By 9 November 2015 the facility was 42 days in arrears amounting to Uganda shillings 4,318,085/=.

The Applicant has no locus standi to inquire about the status of the credit facility of Messieurs Sekum General hardware Ltd and any information given without their consent would be a breach of confidentiality to the customer. The first Applicant will not suffer any irreparable damage because the loan has already been paid off and the second Applicant knew at the time of mortgaging his property that in the event of default, the property could be sold off to recover the first Respondent's money. The principal borrower has not yet rectified the default as required in the notes issued to her. In the premises the balance of convenience is in favour of the first Respondent who is being strained by the principal borrower through defaults and is required by bank of Uganda regulations to channel its own profits to make provision for non-performing assets such as that of the principal borrower. Lastly the Applicant has no locus standi to sue in respect of the credit facility of another entity.

In rejoinder the second Applicant Mr William Ekwong deposed another affidavit and with the advice of his lawyers believed that the affidavit of Arocha Joseph is irregularly on court record and ought to be struck out with costs. Without prejudice he deposes that the first Applicant credit facility was secured by his property the subject matter of the suit. There was a tripartite agreement which was a scheme by the first Respondent to hide monies allegedly disbursed without notice or authority of the Applicants. On 23 January 2013 they disbursed Uganda shillings 100,000,000/= and continued to hold onto his title as security and hence the Applicant filed this suit to resolve the triable issue. He is not aware of any negotiations between the first Applicant and the current principal borrower. At the same time he asserts that the principal borrower is religiously servicing a credit facility with the first Respondent/Defendant. It is the first Respondent who come up with an idea of the tripartite mortgage agreement to be executed between the first Plaintiff, the second Plaintiff and a company called Sekum General Hard Wares Ltd and Uganda shillings 102,000,000/= was to be transferred to the first Applicant/Plaintiff as the drawdown to pay off the loan leaving a balance of Uganda shillings 78,000,000/= to the said Sekum General Hard Wares Ltd secured by the second Applicant's property.

He signed the tripartite agreement on the false belief of the bank officials that his title should be returned upon having a nil balance. On the advice of his lawyers he further deposes that the first Applicant has not locus standi to inquire about the status of the credit facility by the mere reason of having been party to the tripartite agreement. Secondly the first Respondent is still holding the title of the second Applicant and the Respondents are threatening to sell the property. He would suffer irreparable damage if the property is sold as it is a matrimonial home and is being held by the first Respondent out of an illegal transaction of 23 January 2014.

Furthermore the balance of convenience is in favour of the first and second Applicants as the first Respondent still holds the second Applicant title on the ground of the disputed disbursement of 23 January 2014, the subject matter of the main suit.

The grant of a temporary injunction by the court is founded on the discretionary powers of the court. Section 37 (1) of the Judicature Act cap 13 gives the High Court wide discretion to grant an injunctions by an interlocutory order in all cases where it appears just to do so. The order may be made unconditionally or on such terms as the court may think just.

Secondly injunctions under the Civil Procedure Rules for the purpose of maintaining the status quo until the question to be investigated in the suit is or are disposed off finally after adducing evidence which evidence may have been tested by cross-examination of the witnesses during the trial of suit on the merits. In **Kiyimba Kaggwa vs. Katende [1985] HCB at page 43** it was held that the Applicant must show a prima facie case with a probability of success. In **American Cyanamid Co. Ltd v Ethicon [1975] 1 ALL E.R. 504** Lord Diplock held that what needs to be established is that there are serious questions to be tried and that the action is not frivolous or vexatious.

Order 41 rules 1 of the Civil Procedure Rules. Rule 1 (a) provides that where it is proved by affidavit or otherwise 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*”, the court may grant an injunction to maintain the status quo. The applicable rule in this case is order 41 rule 1 (a) because the property of the Applicant is in danger of being sold or alienated pursuant to default of Sekum General Hard Wares Ltd. There is a pending suit challenging the intended sale and the first question is whether there is a serious question to be tried or a prima facie case disclosed so far.

The basic facts in this application are not contentious. The Applicant’s property was advertised for sale by public auction in the Daily Monitor of Wednesday 9th September 2015 at page 29 thereof. The advertisement for sale was procured by the second Respondent who was instructed by the first Respondent to realise the security pursuant to a mortgage. The advert shows that the property was advertised pursuant to a mortgage registered on the property of the second Applicant comprised in Kyadondo block 222 plot 1650 land at Namugongo. The person in default is Sekum General Hard Wares Ltd and the registered proprietor is the second Applicant.

The Respondent’s Counsel on the question of whether there is a prima facie case with a probability of success raised a preliminary objection to the extent that the Applicants have no locus standi to challenge a transaction between it namely the to do with a loan advanced to Sekum General Hard Wares Limited. In other words they are no privy to the loan. Secondly that the previous loan of the Applicants had been paid off and retired and therefore the Applicants have no locus standi to complain about another person's loan.

I have carefully considered the plaint and the action of the Plaintiffs is for declaration that the intended sale of the second Plaintiff's property by the Defendants are illegal, unfair and unjust and a breach of the loan and mortgage agreements which entitled the first Plaintiff to indemnity and a declaration that the foreclosure process is illegal and intended to cause loss to the Plaintiffs.

The Plaintiff avers that on 23 January 2014 without notice and authority of the second Plaintiff Uganda shillings 100,000,000/= was credited on the first Plaintiffs account as disbursement credit. The Respondent does not denying crediting the amount. What is in dispute is whether the disbursement was obtained after the requisite authority of the directors of the first Applicant has been obtained. The Applicant argued that the tripartite agreement was a ploy to get rid of an irregularly obtained disbursement by purporting to pay off the loan when a further loan was advanced to Sekum General Hard Wares Ltd. It is averred that the first Respondent lured the second Applicant into signing the tripartite agreement. Furthermore the arrangement was between the first Applicant Company and Sekum General Hardwares Ltd. While the Respondent asserts that the previous loans of the first Applicant have been cleared off, the property of the 2nd Applicant remains encumbered and liable to be sold. There is a ground for inquiry on the legality of the transaction and triable issues arise.

Secondly a letter dated 24th of November 2014 the first Plaintiff applied for a reschedule of the loan facility and the second Plaintiff's property was valued for purposes of the loan and the valuation report is dated 18th of November 2014. Subsequently on 1 April 2015 hardly 5 months later, a letter of offer was issued by the First Respondent to Sekum General Hard Wares and Ltd for Uganda shillings 180,000,000/=. Under the letter of offer which doubled as an agreement the borrower is defined as Sekum General Hardware Ltd. The agreement also shows that different facilities. The first facility is defined as a contract finance limit of Uganda shillings 78,000,000/=. The second facility is a term loan of Uganda shillings 102,000,000/=. Facility 1 is meant for working capital of various LPO's and facility 2 is to refinance the exposure of GS Royal Hard Ware and Industries Ltd "currently o/s at Uganda shillings 121,861,003/=".

In Annexure II the proposed facility was supposed to be secured by a first ranking legal mortgage of Uganda shillings 180,000,000/= of land and property comprised at plot 1650

Kyadondo block 222 Wakiso district in the names of Ekwong William, the second Applicant. The parties were also required to sign a tripartite mortgage agreement between Ekwong William, Sekum General Hard Wares Ltd and Equity Bank Ltd.

The second Applicant agrees that he signed a tripartite agreement but deposed that he was lured into signing it. A copy of the agreement was not attached to the application. In the affidavit in reply Arocha Joseph the legal officer of the Respondent bank in paragraph 10 of his affidavit deposed that the Applicants loan was paid off on the 13th of April 2015 according to the loan statement of account annexure C. Annexure C which is the statement of account of the first Applicant demonstrates that the first Applicant is not indebted to the Respondent. He further deposed that Sekum General Hard Wares Ltd applied for and was granted a credit facility which was secured by the Land of the second Applicant. The facility was for refinancing of the first Applicant. Sekum General Hard Wares defaulted on her repayment obligations hence the recovery measure of selling the mortgaged property. A demand notice was issued to Sekum General Hard Wares Ltd according to a demand notice dated 14th of October 2015. The demand notice which is attached to the Applicant's application is only addressed to Sekum General Hard Wares Ltd. It shows the Messrs Sekum General Hard Wares Ltd were in arrears by Uganda shillings 4,318,084/=. The Respondent further in the reply contents that the Applicants have no locus standi to inquire into the loan status of Sekum General Hard Wares Ltd.

The Respondent also never attached the relevant tripartite agreement. In the premises there are serious questions to be tried relating to the new facility. How was the property mortgaged? There are no facts in proof of the consent of the Mortgagor or proprietor of the property.

The second Applicant as the purported mortgagor has a right to challenge the sale of his property under the Mortgage Act 2009. Section 33 gives him the right to challenge the sale not only for a cause of action but also for purposes of redemption and provides that:

33. Application for relief by mortgagor.

(1) An application to the court for relief against the exercise by the mortgagee of any of the remedies referred to in section 20 may be made—

(a) by the mortgagor;

(b) if two or more persons are joint mortgagors, by one or more of them on their own behalf;

(c) by a spouse or spouses of the mortgagor; or

(d) by the trustee in bankruptcy of the mortgagor.

(2) Where an application under subsection (1) (b) is not made by all the joint mortgagors, then, unless the court orders otherwise, it shall be served on all the other joint mortgagors.

(3) An application for relief may be made at any time after the service of a notice under section 19, section 22 (2), section 23 (2) or section 24 (1) or section 26 (2), or during the exercise of any of the remedies referred to in those sections.

(4) An application for relief is not to be taken as an admission by the mortgagor or any other person applying for relief that—

(a) there has been a breach of a covenant of the mortgage by the mortgagor;

(b) by reason of such a breach, the mortgagee has the right to exercise the remedy in respect of which the application for relief has been made;

(c) all notices which were required to be served by the mortgagee were properly served; or

(d) the period for remedying the breach specified in the notice served under section 21 was reasonable or had expired, and the court may grant relief without determining all or any of those matters.

The registered proprietor of the property is deemed to be the mortgagor and the second Applicant can apply to court for relief.

I have considered the second issue as to whether the second Applicant would otherwise suffer irreparable injury which cannot be atoned for by way of damages. The Respondent's Counsel

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maXimum728securityx 2016 style*

referred to an earlier decision of this court in **Kakooza Abdulah vs. Stanbic Bank** (supra) in which I applied with approval two decisions of the Kenyan Courts. These decisions are **Matex Commercial Supplies LTD and Another vs. Euro Bank Ltd (in liquidation)** [2008] 1 EA at PP 216 where it was held that that any property whether it is a matrimonial home or a spiritual house which is offered as security for a loan/overdraft is made on the understanding that the property stands at risk of being sold by the lender if default is made on the payment of the debt secured. Secondly where a party agrees that a particular property is suitable for purposes of security, he or she cannot plead that the property has sentimental or spiritual value or sanctity. The second authority is that of **Maithya vs. Housing Finance Company of Kenya and another** [2003] 1 EA at page 133. In that case it was held that securities are valued before lending and loss of property by a sale is contemplated by the parties even before the security is formalised. In such cases damages would be an adequate remedy.

In this case what is being challenged is the manner in which the property of the second Applicant became liable and is at risk of being sold. What is being challenged is the mortgage of the property and there are certain statutory rights granted under section 33 of the Mortgage Act for a mortgagor or registered propriety to seek relief from the sale of the property. The consideration of whether the Applicant would otherwise suffer irreparable injury which cannot be atoned for by an award of damages is the common law. Common law is not applicable where a statute makes provision for a similar matter. The statute namely the Mortgage Act has made provision for the challenge of the mortgage. The nature of the orders that a court may make pursuant to a review of the mortgage include nullification and the court would be misdirected to consider issue of irreparable damage or balance of convenience where there are clear statutory provisions dealing with mortgages and review of mortgages which are applicable. Finally section 14 of the Judicature Act makes common law subject to statutory law. The written law takes precedence over common law.

The issue for consideration primarily is whether the injunction if granted should be preceded by a deposit of a percentage of the outstanding amount or the forced sale value in terms of the mortgage regulations.

The first Applicant is said by first Respondent not to be indebted to the bank and I need not consider arguments about the first Applicant which has nothing to lose. The second Applicant is also not indebted but is the registered proprietor of the mortgaged property that is the subject matter of the challenged intended sale by the first Respondent. The court is handicapped by not having the mortgage agreement to establish a question of fact as to whether the second Applicant on the face of the instrument authorised the further charge on his title. In fact it is strange that the Respondent in the affidavit in reply deposed that the Applicants are not concerned with the status of the loan granted to Messrs Sekum General Hard Wares Ltd. If they are not concerned with the loan why should they pay a deposit to stop the sale? The truth is that any person having an interest in the property has not only locus standi but a right to have the property redeemed to the extent of their interest. Such persons include the spouse of the mortgagor in addition to the mortgagor himself.

Starting with the mortgage Act under section 26 thereof before a mortgagee exercises a power of sale certain persons are entitled to notice.

“26. ...

(2) Before exercising the power to sell the mortgaged land, the mortgagee shall serve a notice to sell in the prescribed form on the mortgagor and shall not proceed to complete any contract for the sale of the mortgaged land until twenty one working days have lapsed from the date of the service of the notice to sell.

(3) A copy of the notice to sell served in accordance with subsection (2) shall be served on—

(a) a mortgagor;

(b) any spouse or spouses of the mortgagor in respect of a matrimonial home;

(c) a surety;

(d) the independent person as provided under this Act; or

(e) in case of customary land, the children and the spouse or Spouses.”

Who is the mortgagor? Obviously the proprietor of the property is deemed to be the mortgagor or an interested person entitled to notice. Under section 2 of the Mortgage Act 2009, a mortgagor includes the registered proprietor of the mortgaged land. Section 2 defines a mortgagor as follows:

“mortgagor” means a person who has mortgaged land or an interest in land and includes any person from time to time deriving title under the original mortgagor or entitled to redeem the mortgage according to his or her estate, interest or right in the mortgaged property;

The mortgagor or the registered proprietor is entitled to notice issued under section 26 of the Mortgage Act before sale of the property. Upon being served with notice of sale they can apply for relief under section 33 of the Mortgage Act 2009. The 2nd Applicant alleges that he only discovered the intended sale but he was not served with statutory notices. This is not only a triable issue but if proved means that the Applicants right to challenge the sale was compromised by want of service. A sale cannot be completed until 21 days after service of notice of intended sale on the interested persons. Under regulation 8 (5) of the Mortgage Regulations 2012, a person who contravenes the provisions of rule 8 which also prescribes notice specified by section 26 of the Mortgage Act commits an offence.

Finally under the Mortgage Regulations 2012 and regulation 13 thereof a person who wants to redeem the property is required to deposit 50% of the outstanding amount.

The Applicants Counsel submitted that the Applicant should not deposit the 50% because the mortgage is being challenged unlike in the other authorities where the provision was challenged. Regulation 13 (5) of the Mortgage Regulations is couched in mandatory language. In the case of **Miao Huaxian vs. Crane Bank Ltd and Another HCMA No. 935 of 2015**, the Applicant undertook to deposit 50% of the outstanding loan amount by a particular date and there was no judicial determination of the issue. The court gave a conditional injunction as noted that neither of the parties would be prejudiced if the order is made as an advert for the sale would not have run for the prescribed period before the undertaken deposit is made. The decision is therefore distinguishable. Secondly each case has to be determined according to the facts and

circumstances. I was referred to two judgments of the High Court where the regulation to deposit prior to injunction were not applied. I will make reference to the case of Nakayaga vs. FINA Bank and Another HCMA NO 471 of 2014, a decision of Hon Lady Justice Hellen Obura Judge of the High Court as she then was. In that case the Hon judge declined to order 30% deposit on the ground that the requirement under regulation 13 (1) applies where the court for reasonable cause adjourns the sale to another date which presupposes that the right to foreclose of the mortgagee is not in dispute as in that case. In this case the issue is whether the entire loan transaction mortgage leading to the advertised sale is illegal.

In this case the 2nd Applicant alleges that he was unaware of the transaction and on the other hand he was surprised by the advertisement of his property. I find this hard to take on the ground that he agreed that he signed a tripartite agreement but that agreement is not in evidence. He raises issues about tacking under section 10 of the Mortgage Act 2009 but no evidence has been advanced to support the fact of an additional charge on his property.

The issue of whether the injunction in this application should be granted will be determined on the basis of the dictates of justice. The Applicant has raised serious questions to be tried as set out above. Secondly in the absence of the mortgage instrument showing that the 2nd Applicant actually mortgaged his property or gave authority to Sekum General Hard Wares Ltd for an additional charge, there is a case based on allegation that the mortgage was procured illegally. Under section 34 of the Mortgage Act 2009 the court has power to review a mortgage on the ground that it was procured through fraud, deceit, or misrepresentation by the mortgagor or in a manner or containing a provision which is unlawful. Was the mortgage obtained lawfully or in a manner that was unlawful?

Secondly the court has power to declare the mortgage void, or be enforced subject to such modifications as the court would order (See section 36 Mortgage Act 2009). The Plaintiff seeks a declaration that the actions of the Respondent on the first Applicant's account are illegal. Secondly he seeks an order stopping the Defendants from selling the property.

The second Applicant's suit would be rendered nugatory and the final declarations sought and remedies of injunction would be avoided if the injunction is not granted. The law gives the court

a limited jurisdiction to preserve the right of hearing and the principle is stated in the case of **Wilson V. Church (1879) vol 12 Ch D 454** where it was held that:

“As a matter of practice, where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court in ordinary cases to make such order for staying proceedings in the Judgment appealed from as will prevent the appeal if successful from being rendered nugatory.”

This principle was quoted with approval by the Supreme Court of Uganda in **Somali Democratic Republic V. Anoop Sunderial Trean C.A.C.A No 11 of 1988** before Manyindo DCJ Odoki J.S.C and Oder J.S.C. Supreme Court held that where an unsuccessful party is exercising a right of appeal, it is the duty of the appellate court to prevent the appeal from being rendered nugatory.

The principle in the above appeal extends to temporary injunctions, stay of executions and preservation of the right of hearing in original suits as well as it can have the same objective of preserving the right of hearing or a legal right. In this suit the applicant has a right to be heard before the sale, if all, of his property is to be conducted. Moreover he has raised the issue of failure to serve statutory notices on him.

Such an action deals with an intended sale and should be determined expeditiously.

In this application the second Applicant seeks relief through exercise of rights granted by statute under the Mortgage Act to review the mortgage and the right of the Applicant to have it declared a nullity. His statutory rights under section 33 of the Mortgage Act would be rendered nugatory if his remedy is curtailed before he is heard. In the bare minimum he is entitled to an injunction in the circumstances of this case until the matter is investigated. Finally section 37 (1) confers on the High Court jurisdiction to grant an injunction in all cases where it appears to the High Court just and convenient to do so. This jurisdiction was considered in the case of **Montgomery vs. Montgomery [1964] ALL E.R. 22** where Ormrod J held that an injunction can be granted solely to protect a legal right. He held that the power was derived from the Supreme Court Judicature (Consolidation) Act, 1923, s. 45 (1) which provides:

‘The High court may grant a mandamus or an injunction ... by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do’.

The provision is in *pari materia* with section 37 (1) of the Judicature Act cap 13 Laws of Uganda. Omrod further held that it is a fundamental rule that an injunction is issued only to support a legal right. As noted above the Applicant in this case is seeking to enforce a right granted by section 33 of the Mortgage Act to challenge the mortgage for illegality.

In the premises a temporary injunction issues restraining the Respondents, their agents and servants or any other party from selling the 2nd Applicant’s property the subject matter of the suit pending resolution of the main suit HCCS 721 of 2015 or until such further orders of the court. The costs of the Application are costs of the cause.

The main suit shall be referred for mediation immediately and mediation shall be commenced and completed within 45 days from the date of this ruling unless otherwise the period is extended by order of the court.

Ruling delivered in open court on the 24th of March 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Edward Ocen Counsel for the Respondent

Aggrey Mpora Counsel for the Applicant

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maXimum728securityx 2016 style*

24th March 2016