

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

**MISCELLANEOUS APPLICATION NO 829 OF 2015
(ARISING FROM CIVIL SUIT NO 649 OF 2015)**

- 1. STEEL ROLLING MILLS LTD}**
- 2. NYUMBA YA CHUMA LTD}**
- 3. SCRAP PROCESSORS LTD}APPLICANTS**

VS

STANDARD CHARTERED BANK (U) LTD}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The three Applicants applied for a temporary injunction to restrain the Respondent, its servants or agents from foreclosing and or selling the Applicants mortgaged properties comprised in LRV 1618 folio 17 plot BIDCO Rd, Masese Jinja, LRV 33897 folio 6 Plot 92A Fifth Street, industrial area Kampala, block 449 plots 3 to Busiro County and LRV 4238 folio 1 Plots 106 – 108 industrial estate road pending hearing and final determination of High Court Civil Suit Number 649 of 2015. Secondly the Applicants seek a temporary injunction order restraining the Respondent, its servants or its agents from enforcing the Applicant’s debenture or appointing a receiver there under pending hearing and final determination of HCCS 649 of 2015. Finally the Applicants pray for costs of the application to be provided for.

It is averred that the grounds of the application as set out in the affidavit of the Managing Director of the first Applicant Mr Abid Alam. The grounds of the application are briefly also included in the chamber summons as follows:

the Applicants filed HCCS No. 649 of 2015 which is yet to be fixed for hearing in which they seek orders and declarations inter alia that a permanent injunction should be issued restraining the Respondent, its servants or agents from foreclosing or selling the Applicants mortgaged properties comprised in LRV 1618 folio 17 plot BIDCO Rd, Masese Jinja, LRV 33897 Folio 6 Plot 92A Fifth Street, Industrial Area Kampala, Block 449 plots 3 to Busiro County and LRV 4238 folio 1 Plot 106 – 108 Industrial Estate Road. Secondly it is for a permanent injunction to restrain the Respondent, its servants or its agents from enforcing the Applicants debentures or appointing a receiver there under.

Secondly in the head suit the Applicants are challenging the legality and enforceability of the facility letters/master credit agreement for the loan issued by the Respondent to the first Applicant.

Thirdly the main suit discloses substantial issues that warrant court investigations and with a high likelihood of success.

Fourthly the Respondent bank is threatening to unlawfully foreclose on the Applicant's mortgaged property and enforce the debenture.

Fifthly if not restrained by orders sought in the application, the Applicants are likely to suffer irreparable damage and prosecution of the main suit will most likely be rendered an exercise in futility.

Sixthly the balance of convenience favours the Applicants.

Lastly it is averred that is the interest of justice that the temporary injunction is issued pending the hearing and final determination of the main suit.

The affidavit of Mr Abid Alam in support of the application deposes that he is the Group Managing Director of the first Applicant in which capacity he deposes to the affidavit. Paragraphs 1, 2 and 3 of the affidavit repeat the averments in paragraphs 1 and 2 of the Chamber Summons. The facts in support of the application disclosed in the affidavit are that on 23 January 2014 and on 29 December 2014 the Respondent bank offered the first Applicant two amalgamated loan facilities amounting to Uganda shillings 18,674,266,000/= and US\$10,107,270 which facilities were subject to the Respondent's master credit terms according

to copies of the offer letter's and master credit agreement attached to the affidavit. The loans were secured by several properties the subject matter of the application which has been detailed before and the deponent provided copies of the mortgage deeds in the affidavit in support as annexure "E" and "F". The loan facilities were meant to finance the purchase of machinery and equipment for a Sponge Iron Plant to fix into the company's factory and also as medium-term loans originally to cover current excess position due to monthly interest and standing order payments as well as matured trade loans during expansion projections within the group. The first Applicant did not deviate from the purpose of the loan, and installed the Sponge Iron Plant which is now fully operational and the proceeds thereof are being channelled towards discharging the first Applicant's loan obligations.

The loan facilities were to subsist for periods of up to 96 months so as to enable the first Applicant generate funds from the operation of the factory in order to repay the loan. The first Applicant on the 26th of May 2015 and on 30 June 2015 paid to the Respondent US\$550,000 and Uganda shillings 2,200,000,000/= respectively. It was rather unfortunate and shocking when on 12 August 2015, the Respondent issued a notice recalling the entire outstanding loan in the amount of Uganda shillings 18,234,655,082/= and US\$7,763,305.04 and claiming that the debenture is immediately enforceable in total contravention of the Mortgage Act. The second and third Applicants who are owners of some of the mortgaged properties were not served with any notices and only came to learn of the recalling/intended enforcement through the directors of the first Applicant.

While the 45 days in the notice was running, the Respondent's officials and lawyers kept pressuring the Applicants to sell the mortgaged properties to retire the entire loan outstanding.

The Applicant's case is not frivolous and vexatious and there are serious questions to be tried which merits judicial consideration. On the ground of advice of his lawyers Messieurs Muwema and Company Advocates Mr Abid Alam further deposes that the facility letters contained terms regarding interest rates which are vague and speculative as they provided that interest is subject to change in line with market forces at the sole discretion of the bank. Secondly the mortgage deed of 10 December 2011 contains clause 8.17 (a) which is substantially unfair and illegal that the Mortgagor when in default is required to immediately vacate the mortgaged property on the first demand without opportunity to remedy the defects. Thirdly the offer letter and master credit

terms are unlawful, manifestly unfair and unjust as it offends the Bank of Uganda Consumer Protection Guidelines, 2011 which require fairness, reliability and transparency in banker/customer relationships. Fourthly section 20 (c), (d) and (3) of the Mortgage Act giving the Mortgagee powers to enter and dispose of the Mortgagor's property is in contravention of article 26 (1) and 26 (2) (b) (i) and should be declared unconstitutional.

Alternatively the Applicants assert without prejudice that it is premature, unreasonable and defeats the intention of the parties for the Respondent to recall the total outstanding loan amount of Uganda shillings 18,234,685,082/= plus US\$7,763,305.04 to be repaid in 45 days when the loan period had not expired and has a period of 96 months till its expiry. The intended foreclosure is to be conducted by the Respondent and the facility offer letter is a mortgage deeds which are under investigation for invalidity and unenforceability. The Applicant should be able to establish the claim at the trial and it has a high likelihood of success. The deponent further asserts that if the Respondents are not restrained from foreclosing the Applicant's property and debenture before the main suit is determined, the Applicant will suffer irreparable or substantial loss which cannot be atoned for by an award of damages and the remedies sought in the main suit will be rendered nugatory.

The Applicants further assert that the balance of convenience favours them because the Respondent can recover any money that may be due to it after termination of the main suit but the Applicant would have lost their property, business and good will. Applicants further assert that it is in the interest of justice and the general public/community that a temporary injunction is issued as the Applicant employs over 1000 Ugandans and the company is one of the largest contributors to the country's revenue. Putting a stop to its business will render so many people unemployed and the government will lose large sums of money.

The affidavit in reply filed on behalf of the Respondent is that of Mr Richard Ssuna the GSAM manager Corporate and Institutional Clients of the Respondent. He has read through the deposition of Abid Alam in support of the application and in the reply thereto deposes that on 30 December 2010 the first Applicant obtained a loan facility from the Respondent. The loan was secured by a mortgage and debenture over the assets of the Applicants according to copies of the debenture and mortgage attached. The first Applicant defaulted on its loan obligations and requested the Respondent to restructure the existing loan facility. On 23 January 2013 the first

Respondent approved and offered the Applicant a fresh loan facility worth Uganda shillings 5,500,000,000/= and US\$3,500,000. On 24 December 2014 the Respondent agreed to extend a further loan facility worth Uganda shillings 7,614,266,000/= and copies of each of the facility letters are attached. The loans were simultaneously secured inter alia by mortgages on the property the subject of the application for a temporary injunction listed above. The first Applicant began defaulting on its loan obligations sometime in 2012. Following the default, the Applicant made various repayment proposals and offered to normalise its repayment obligations according to copies of correspondence attached.

Under the mortgage deed, the loan amount together with all interest thereon is payable by equal monthly instalments from the date of disbursement of the loan without the requirement of a reminder to make the payment. Secondly the mortgage deed provides that in the event of default the Respondent may recall the loan and realise the security pledged and exercise its statutory power of sale. The first Applicant upon default in its repayment obligations and despite several reminders refused or failed or neglected to pay the amount due under the loan agreement. Following the continual default of the first Applicant, the Respondent notified the Applicant about its default in the loan repayment obligations and recalled the loan in accordance with the law and the mortgage deed, demanding payment of all total monies due to it under the mortgage. The Applicant was notified that upon failure to comply with the terms of the demand notice, the Respondent would begin the recovery process which included the option of either placing the first Applicant under receivership or sale of the mortgaged properties as detailed in the default notices attached to the affidavit in reply. The deponent on the basis of advice of his lawyers Messieurs Kampala associated advocates asserts that the head suit is incompetent and bad in law. The sale of the suit property can only be stopped if the Applicant makes payment of the outstanding amount. In the premises the Applicants have no prima facie case with a likelihood of success on the following grounds:

- a. The Mortgage Deed 2011 allows the Respondent disposing of the secured properties only when the mortgage became enforceable after the lapse of the demand notice and mandatory vacation of the default. The mortgage deed is in pari materia with the Mortgage Act.

- b. The contents of the master credit terms to which the loan facilities relate are not irrepressible, harsh and unfair and the Applicants will be put to strict proof there under:
 - i. In any event the Respondent avers that the Applicants willingly entered into the master credit terms contract and cannot belatedly and baselessly claim unfairness in the contract.
 - ii. The Respondent is recalling its loan and demanding payment of the entire outstanding amounts not on the basis of the master credit terms but under the Mortgage Act.
 - iii. The master credit terms agreement, envisages a branch setting. The Applicants are not part of the right settings envisaged under the relevant clause. The clause does not bar the Respondent from exercising its right to demand payment, recall the loan or enforce its securities after default by the Applicants.
 - iv. Indemnity for any loss in the master credit terms only arises if the loss was the result of the default of the Applicants. If the loss was the result of the actions of the Respondent, then the Applicants would not be expected to indemnify the Respondent.
 - v. The power to vary or amend the terms of the agreement was agreed upon by the parties. The Applicants consented to the terms of the agreement and cannot seek to vary the same at this stage of the proceedings. The Respondent cannot be barred from exercising its right to demand payment, recall the loan or enforce its securities after default by the Applicant.

The Applicant seeks an equitable remedy which requires it to come to court with clean hands. However there is no mention by the Applicant of any intention to pay the outstanding amount and the Applicant is seeking orders of this court to assist it in continuing to default on its loan obligations. The Respondent's officer also deposes that if an injunction is issued in favour of the Applicant, the Respondent would suffer irreparable damage. The only assets that the Applicant pledged are being wasted away and eaten away by the equity of redemption and it is reducing the possibility of the Respondent recovering the amounts due and owing. The terms of the mortgage deeds are certain, fair and squarely within the limits of the law and furthermore the Applicant accepted the terms freely and without any form of coercion. The discretionary power to change or vary the interest rates is done in accordance with the Bank of Uganda Guidelines. In the premises the master credit agreement are fair and lawful and the Applicants will be put to strict proof to prove that they are harsh, irrepressible or unfair. The first Applicant at all material times and subsequently during the 45 days notice made representations that it was making

arrangements to pay off the amounts due but instead filed the suit with the intention of delaying its obligations and frustrating the Respondent's efforts to recover amounts rightly due to it.

In the premises the Applicant has no prima facie case with a likelihood of success. The amounts being sought by the Respondents are due and owing and therefore the suit was commenced in bad faith and is frivolous and vexatious. The Applicant will not suffer any irreparable injury. The Applicant mortgaged the suit property and was aware that in the event of default, the suit property would be sold. The application should not be granted because the Applicant can be compensated by an award of damages. The Respondent is a reputable financial institution with the ability to refund any amounts due to the Applicant if the court so ordered. The value of the suit property is known and the Respondent is capable of compensating the Applicants in the event that it is successful in the main suit.

Finally Richard Ssuna deposes that the balance of convenience favours the Respondent. The Respondent stands to lose more than the Applicant in the event that this application is granted since the Respondent would be deprived of collecting money rightfully due and owing to it, vital for its day-to-day businesses as a financial institution. Lastly it would be an abuse of the court process if the orders sought by the Applicants are granted as the Applicants claim against the Respondent is frivolous and vexatious.

At the hearing of the application Counsel Charles Nsubuga holding brief for Counsel Fred Muwema represented the Applicant while Counsel Bruce Musinguzi represented the Respondent. The court was addressed in written submissions.

The Applicant's case is as presented in the chamber summons together with the affidavit in support of the application.

The Applicant's Counsel submitted that interlocutory applications for temporary injunctions are meant to provide interim relief but not dispose of the main suit which should remain to be heard on its merits. The interim relief sought has the effect of maintaining the status quo pending disposal of the main suit before the court. The conditions for grant of a temporary injunction are that firstly the Applicant must show a prima facie case with a likelihood of success or that there are serious questions that need courts investigation. Secondly the Applicants must show that he or she will suffer irreparable damage/injury if the application is not granted and which damage

would not be adequately compensated by an award of damages. Where the court is in doubt, it will decide the case on the balance of probabilities. The conditions for the grant of a temporary injunction are considered in the cases of **Kiyimba Kaggwa versus Hajj Nasser Katende HCCS 409 of 1999, America Cyanamid versus Ethicon; Napro Industries Ltd versus Five Star Industries and Style Life Industries; High Court Miscellaneous Application Number 773 of 2004** both quoted with approval in the case of **Kakooza versus Stanbic bank (U) Ltd HCMA a 614 of 2012.**

As far as the prima facie case is concerned, the Applicant's case is that it obtained a loan facility from the Respondent to finance the purchase of machinery and equipment for a Sponge Iron Plant which was done and the factory is now fully operational. The loan facility repayment period was 96 months. The first Applicant despite economic hardships effected substantial amounts towards the repayment of the loan according to the evidence under paragraph 9 of the affidavits in support of the application which has not been denied by the Respondent. The loan facility was secured by several suit properties belonging to not only the first but also to the other Applicants. On 12 August 2015 the Respondent served a notice of default on the first Applicant recalling the bank loan and claiming that the debenture was now enforceable in total contravention of the Mortgage Act. It is neither fair nor legal for the Respondent to recall the loan given the magnitude of the project that the Respondent is well acquainted with. The Applicant's Counsel further contends that the Respondent did not carry out service of notice of default on the second and third Applicants before recalling the loan as envisaged under sections 19 and 20 of the Mortgage Act. It was belatedly served on the managing director of the first Applicant on 16 October 2015. This application was filed on 14 October 2015 and the alleged service of notice of default on the second and third Applicants is on 16 October 2015 according to the evidence annexed. Service of notice of default on the first Respondent without serving the rest of the Applicants who are also managers of the property contravened the provisions of sections 19 and 20 of the Mortgage Act and is illegal.

In the premises the Applicants Counsel submitted that there are serious questions to be tried which warrant judicial consideration in respect of the legality of the mortgage deeds, interest rates which are vague and speculative. It was wrong for the Respondent to maintain that the Applicant does not have a prima facie case with a likelihood of success.

On the question of whether the Applicant would suffer irreparable damage Counsel relies on the dictionary definition of irreparable damage in **Black's Law Dictionary** as well as the case of **Liberty Construction Company Ltd and Another versus Centenary Bank Ltd** (supra). The Applicant relies on the affidavit in support for the contention that if the application is not granted the Applicant would suffer irreparable injury. Furthermore putting a stop on the business of the Applicants would cause unemployment to over 1000 Ugandans and might result in an avalanche of suits against the Applicants by the employees and other business partners. Most of the security, the subject matter of the suit are factories manufacturing different products and if tampered with production would stop affecting the Applicant's business in the same properties and cannot be anyway replaced in the event that the main suit is decided in favour of the Applicant. The different properties the Respondent intends to foreclose her in very prime areas and neighbouring used as factories for manufacture of different items. The property cannot be replaced by way of damages and the kind of business been carried out therein is irreplaceable. In the premises the Applicant would suffer irreparable damage if the application is not granted which damage cannot be atoned for by an award of damages.

Balance of convenience:

On the question of balance of convenience, where the court is in doubt on the first two principles of disclosure of a prima facie case or serious questions to be tried as well as irreparable damage, the court would determine the application on the balance of convenience.

The Applicant is likely to suffer more injustice than would the Respondent if the orders sought are not granted. The Respondent can sell and recover all the outstanding amounts in the event that the main suit is determined against the Applicants. The first Applicant is operating a factory where loan amounts were utilised according to the evidence in support of the application and the proceeds being generated are going towards discharging the first Applicant's loan obligations.

The Respondent has not denied the fact that a substantial amount was paid as evidenced by the affidavit in support of the application. Lastly there is evidence that the second and third Applicants were never served with the demand notices envisaged under sections 19 and 20 of the Mortgage Act 2009 rendering the intended recall of the loan and foreclosure illegal.

In reply the Respondents Counsel submitted that on the 30th of December 2010 the first Applicant obtained a loan facility from the Respondent secured by mortgage and debenture of the assets of the Applicants. The first Applicant defaulted on its loan obligations and requested the Respondent to restructure the already long existing loan facility. On 23 January 2014 the Respondent approved and offered the Applicant a fresh loan facility through restructuring worth Uganda shillings 5,500,000,000/= and US\$3,500,000. On 24 December 2013 the Respondent extended a further loan facility of Uganda shillings 7,614,266,000/= and US\$8,107,270. The first Applicant continued defaulting on its loan obligations and several repayment proposals were made by the Applicant to normalise its repayment obligations. The first Applicant continued to default on its repayment obligations and despite several reminders it failed or neglected to pay the amounts due under the loan agreement. The Respondents served the Applicant with notices of default and recalled the entire loan. On 2 November 2015 the Applicant obtained an unconditional interim order restraining the Respondent from foreclosing on the mortgage and/or appointing receivers in respect thereto. As a result, the Applicant has to date not paid any money towards the loan. The Applicants are not seeking a temporary injunction to continue with their default.

On whether the Applicant's application discloses a prima facie case or serious questions to be tried? The Respondents Counsel submitted that the Applicant seems to rely on three grounds to prove the existence of a prima facie case. The first one is that given the magnitude of the project for which the loan was acquired, the Respondent's action of instantly recalling the loan is harsh, unfair and unlawful. He submitted that section 19 (2) of the Mortgage Act allows the Mortgagee to demand the Mortgagor to pay all the money owing on the mortgage in the event of default. Secondly the mortgage deed provides for the same thing. Consequently the Respondent's action in recalling the entire loan was within the limits of the law and the mortgage deed. The Applicant has admitted in paragraph 5 (m) of the Plaint that in fact they defaulted on their loan repayment obligations. The Respondent's case in the affidavit evidence is that the Applicants defaulted on the loan repayment obligations since 2012 and made several proposals for repayments. In the case of **Labelle International Ltd and another versus Fidelity Commercial Bank and another [2003] 2 EA 535 at 544** it was held that an injunction should not be granted where indebtedness is admitted. Despite the magnitude of the project since the first Applicant has been in default of its loan obligations and admittedly so and the court as the court of equity should not

allow the Applicants to benefit from their default. The magnitude of the project does not constitute in law or fact a justification for an order of a temporary injunction.

Secondly the Respondent dwelt on the failure to serve notices of default on the second and third Applicants. The Respondents Counsel admitted that the first Applicant obtained a loan from the Respondent and pledged property that belong to the first, second and third Applicant. The first Applicant in its personal capacity had a debenture and mortgage with the Respondent. It is further admitted that following its default on 12 August 2015 the Respondent served a notice of default on the first Applicant. The Respondent also served the second and third Applicants with notices of default on 16 October 2015 a fact that is admitted by the Applicant. Section 19 (2) of the Mortgage Act provides the Respondent's basis of a notice of default on the Mortgagor. The section is not mandatory. Section 19 (3) (d) of the Mortgage Act only provides that the remedies available to the Mortgagee kick in after a period of notice has expired. This only means therefore that the remedies against the second and third Applicant became available to the Respondent 45 days after the notices were issued to them. Challenging the failure to issue notices was premature. The second and third Applicants could only have challenged the failure to give notice if the Respondent had taken action against them before the requisite notice. The question is therefore why the second and third Applicants sought remedies before any action had been taken against them? Therefore it was within its rights to have only enforced against the first Applicant who had pledged as security that which belonged to it alone.

The Respondent has exercised its statutory rights to issue notices to the second and third Applicants. The court would be delving into academic discussions if the effect of resolving issues regarding the notice of default as it is admitted that the same has been done.

Thirdly the Applicant raised the prima facie case and arguments on the legality of the mortgage deeds and interest rates. For the Applicants to contest the legality of the mortgage deed, the Applicant must do more than just question it generally they must at the very least present court the provisions that are impugned and a brief explanation of their discontent. The Applicant only generally states that it is challenging the legality of the mortgage and there is no evidence of a serious question to be tried at all.

With regard to interest rates, on top of the fact that the Applicants have not in the submissions clarified what aspect of the interest rates they challenge, it is trite law that challenging interest payable in the mortgage transaction is not a valid ground for seeking the discretionary power of an injunction according to the case of **Mugambi versus Housing Finance Company of Kenya Ltd [2006] 1 EA 231**. In that suit the Applicant claimed there was illegal interest and charges as forming his prima facie case. The court held that the issue of valuation and rates of interest is well settled. It held that a penalty interest and default charges which are charged by the bank would not be a sufficient ground to restrain the chargee from exercising its statutory power of sale as damages would be an adequate remedy to compensate the aggrieved charger if it proves that there was such illegal charging of penalty interest and default charges. The court relied on the case of **Francis JK Ichatha vs. Housing Finance Company of Kenya Court of Appeal Civil Appeal Number 108 of 2005** in which it was held that the dispute having been centred not on the existence of default, which was admitted by the Applicant, but on interest and illegal charges, formed no basis for restraining the Respondents from exercising their remedies against the Applicant. This principle was accepted in **Uganda in Green Skyways Agencies Ltd and another versus Bank of Africa HCMA Number 689 of 2013** where the court held that there would be no arguable case or a prima facie case where the Applicants have failed to satisfactorily perform their loan obligations.

In the matter before the court the Applicants do not at any time deny receiving money from the bank. They also admit defaulting on payment both in the affidavit in support of the application and in the plaint. Since it is common ground that the Applicants are in default and indeed the Applicants are bound by their pleadings, the Respondent cannot be restrained from resorting to the remedies available to it in procuring the amounts due or at the very least, the undisputed amount of the loan amounts due to it. In the premises the Respondents Counsel maintains that the Applicant failed to prove a prima facie case or serious questions to be tried.

On the question of irreparable damage/injury? The Respondent's Counsel with the reference to the submission that putting a stop to the business of the Applicants would cause 1000 Ugandans to lose their employment, cause loss of business income to the Applicants and open floodgates of lawsuits against them is untenable because the property was pledged as security and was envisaged by the parties to be subject to foreclosure upon default. He relied on the case of **Matex**

Supplies Ltd and another versus Euro bank Ltd (in liquidation) [2008] 1 EA 216, David Luyiga versus Standard Bank HCMA Number 202 of 2012; Green Skyways and Another versus Bank of Africa (supra). In the case of **Maithya versus Housing Finance Company of Kenya and Another [2003] 1 EA 133** it was held that property mortgaged is valued before the lending and loss of the property by sale is contemplated by the parties even before the security is formalised. In such cases damages would be an adequate remedy.

The Respondent's Counsel submitted that all the claims of irreparable injury by the Applicants relate to the inevitable consequences of putting the commercial property as security for a mortgage in the event of default. The Applicants cannot claim in retrospect that the consequences of such a default cannot be compensated by an award of damages. The Respondents Counsel further relied on the case of **American Cyanamid Company versus Ethicon Ltd [1975] 1 All ER 504** and 510 where it was held that in situations where a financial institution is involved and it is capable of paying any amounts that arise in the form of damages, then an injunction cannot be granted. The Respondent in the affidavit in reply maintains that it is capable of paying any amount awarded by the court in the form of damages. In addition the Respondent has not advertised the property for sale, and therefore other remedies that do not involve closure of the business can be resorted to. The property can be placed under receivership. In the premises the case of **Liberty Construction Company Ltd and another versus Centenary Bank** is distinguishable because the Respondent has not indicated that it intends to shut down the factory. The notice of default spelt out a variety of options if the default continued including receivership that would not result in the lockdown of the premises. Finally the Respondent cannot be restrained from recovering money rightfully due and owing to it because of the unfavourable or inconvenient consequences it may cause to the defaulting Applicants.

Balance of convenience. On this question the Respondent's Counsel submits that based on the first two conditions submitted upon, there is no doubt that the Applicants have not proved a case for the grant of a temporary injunction. In the unlikely event that the court remains in doubt, the balance of convenience is in favour of the Respondent. This is because the Applicants have already admitted their default in repayment of the loan facility. The Respondent is a reputable financial institution that is capable and willing to pay amounts awarded against it. In **Maithya versus Housing Finance Company and Another** (supra) the court held that should the

injunction be refused, the Respondent security would continue to be eaten away by the mounting redemption money and the security might be insufficient to satisfy the ultimate balance due whereas on the other hand of the scale the Respondent would be able to satisfy whatever decree is passed against it. In those circumstances the balance of convenience tilts very heavily in favour of the Respondent.

Counsel submitted that because the temporary injunction is an equitable remedy, it is important to consider the conduct of the party seeking the equitable relief. The Applicants clearly admitted that they defaulted in repayment of the loan monies for a considerable period of time. They have ousted themselves from the exercise of the judicial discretion of the court to grant such an equitable remedy.

Finally Counsel submitted that if the court is inclined to grant the injunction to stop the Respondent from selling the mortgaged properties, the Applicants should be given a conditional injunction. The Applicant had obtained an unconditional interim order on the 22nd of November 2015 and to date they have not paid any money towards the loan. There are now seeking to extend the default through the application without paying any amounts. Under regulation 13 (3) of the Mortgage Regulations, it is mandatory that before the court grants an order of stoppage of sale, the Applicants should have paid 30% of the outstanding amount. He relied on the interpretation of the rule in **Miao Huaxian in versus Crane Bank Ltd and Another HCMA 935 of 2015** where it was held that the provision for the deposit of 30% or 50% was mandatory in situations where the person seeks to stop the Mortgagor from foreclosing and selling the property. He submitted the alternative that the Applicants jointly and severally pay 30% of the outstanding amount for the injunction to be granted.

In rejoinder the Applicants Counsel submitted that given the magnitude of the project for which the loan was acquired, the Respondent's action of instantly recalling the loan is harsh, unfair and unlawful. He submitted that it is not true that the Applicants admitted its indebtedness to the Respondent as alleged since the interest the Respondent is charging is contested in the main suit. It is therefore the Applicant's contention that the amounts being demanded by the Respondent inclusive of interest are contested and therefore not admitted. The Applicants in the plaint in paragraph 4 are challenging the whole loan transaction. The case of **Labelle International Ltd**

and Another versus Fidelity Commercial Bank and Another (2003) 2 EA 535 of 554 is distinguishable because there is no admission on the part of the Applicants.

Both in the plaint and the application as well as in the submissions the Applicants are contesting the loan, a fact that can only be determined by hearing and resolving the issue in the main suit.

On the question of failure to serve notices of default on the second and third Applicant's, the Applicant's Counsel rejoined that the Respondent admits that the second and third Applicants were not served with statutory notices as envisaged under the law and yet the property was scheduled to be sold under a notice of default served on the first Applicant.

Service of the notice of default only on the first Applicant and not on the rest of the Applicants was illegal since it affected the properties belonging to the other parties who were not served. Service of notice of default on the second and third Applicants belatedly after the Respondent was brought to court is in itself an admission of non service at the time the cause of action arose.

Concerning the legality of the mortgage deeds and interest rates, the Applicant's Counsel submitted that the court should not consider the merits of the case. The issue of interest should be determined in the main suit that is pending before court.

On the question of damages or irreparable injury, the Applicant's properties are in prime areas capable of raising the entire Respondents' alleged monies in the event that the main suit is decided in favour of the Respondent. In those circumstances the damages were likely to be suffered by the Applicants and not the Respondent.

On the question of balance of convenience, it favours the Applicants since there was no amount of money that can replace the properties in issue and more so the Applicant's case raises important issues that the court needs to investigate in the main suit.

Finally on the conduct of the Applicant, the issue is alien to the Applicants and the court since it was raised at the stage of submissions and it is nowhere in the proceedings and the court ought to disregard it.

Ruling

I have carefully considered the Applicant's application together with the submissions of Counsel as well as the authorities cited. The court exercises a discretionary power in the exercise of its jurisdiction to grant or refuse the grant of a temporary injunction. Secondly the purpose of an injunction is to maintain the status quo until the suit is determined on the merits. For instance the status quo is safeguarded to avoid the claim to remedy of the plaintiff in the property which is to be determined in the main suit from being rendered nugatory. It may be granted for instance to prevent property from being alienated or disposed of by a party to the suit according to the wording of Order 41 rule 1 (a) of the Civil Procedure Rules which provides inter alia 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, the court may grant the injunction to prevent the wastage, damage or alienation of the property the subject matter of the suit.

The basic complaint of the Applicant is found in paragraph 4 of the Chamber Summons which is that the Respondent bank is threatening to unlawfully foreclose on the Applicant's mortgaged property and enforce the debenture. In other words the Applicant asserts that its property is in danger of being foreclosed and there is danger of enforcement of the debenture. This falls within the principles of Order 41 rule 1 (a) of the Civil Procedure Rules. Order 41 rule 1 requires the matter to be in a suit and to be proved by affidavit or otherwise. The Applicant has indeed proved that there is a pending suit between the parties. Secondly there is an affidavit in support of the application in an effort to prove the grounds for the grant of a temporary injunction in terms of Order 41 rule 1 (a) of the Civil Procedure Rules. In conclusion this is an application in which it has to be proved by affidavit that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by a party to the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose of his or her property with a view to defraud his or her creditors. This is not a matter which was to be proved by any other way other than by affidavit.

In the affidavit in support of the application Mr Abid Alam, the Managing Director of the first Applicant gives a background to the loans and credit facilities advanced to the Applicant by the Respondent bank. The complaint is that on the 12th of August 2015 the Respondent issued a notice recalling the entire outstanding loan in the sum of Uganda shillings 18,234,685,082/= and

US\$7,763,305.04. The demand letter is attached as annexure "J" to paragraph 10 of the affidavit in support. Annexure "J" is dated 12th of August 2015 and is addressed to the Managing Director of the first Applicant. It is entitled as a "Demand notice/loan recall". At page 2 thereof it is written that the first Applicant company since defaulted on its monthly repayment obligations in spite of repeated reminders, demands, and notices, it has failed/refused/neglected to regularise its account, with the result that arrears have continued to accrue. The first Applicant is notified in that letter that it defaulted on obligations and what was due was the entire outstanding loan. Overall the first Applicant was overdue to pay the instalments by 155 days. The letter writes that the facility has been recalled and the first Respondent should pay the total monies outstanding, together with legal fees. Lastly it is asserted that upon default the mortgage would be enforceable within 45 working days wherein the Respondent bank would proceed to exercise any of the alternative remedies namely of appointing a receiver of the secured properties; leasing/sub releasing the secured properties; entering into possession of the mortgage land; or selling the mortgaged lands.

The Applicant asserts that the second and third Applicants are owners of some of the mortgaged properties and were not served with any notice and only came to learn of the recalling/intended enforcement through directors of the first Applicant.

The deponent also asserts that before the 45 days expired, the Respondent's officials and lawyers kept pressuring the Applicants to sell off the mortgaged properties to retire the entire loan outstanding. No particulars of these officials or lawyers or instances of pressure are given.

On matters of law in paragraph 13 of the affidavit in support of the application, the Applicant asserts that clause 8.17 (a) of the mortgage deed dated 10th of December 2011 is substantially unfair and illegal in that the Mortgagor when in default is required immediately to vacate the mortgaged property on first demand without opportunity to remedy the defect. The deponent further deposes in paragraph 13 that the offer letter and master credit terms are unlawful, manifestly unfair and unjust as it offends the Bank of Uganda Consumer Protection Guidelines 2011 which requires fairness, reliability, and transparency in banker/customer relations. Finally the Applicant asserts that section 20 (c), (d) and (e) of the Mortgage Act giving the Mortgagee powers to enter and dispose of the Mortgagor's property contravenes article 26 (1) and 26 (2) (b) (i) of the Constitution of the Republic of Uganda and should be declared unconstitutional.

Judicial precedents interpreting Order 41 rule 1 of the Civil Procedure Rules require the Applicant to first of all disclose in the application that there is a prima facie case or an arguable case according to **American Cyanamid Co Ltd versus Ethicon [1975] 1 All ER at page 504**. In the context of Order 41 rule 1 of the Civil Procedure Rules, I understand prima facie case or an arguable case that merits serious judicial consideration, it to mean that firstly the Applicant's property which is in dispute in the suit is in danger of been wasted, damaged or alienated by the Respondent or wrongfully sold in execution of a decree or the Respondent threatens or intends to remove or dispose of his or her property with a view to defraud his or her creditors. Going by the literal construction of the rule above, is the Applicants property in danger of been wasted, damaged or alienated by a party to the suit? Secondly as far as the suit is concerned, is there a prima facie case with a probability of success or is there an arguable case disclosed?

The Applicant in paragraph 13 of the affidavit in support of the application asserts that paragraph 8.17 (a) of the mortgage deed is substantially unfair and illegal. For ease of reference the quoted provision provides that the Mortgagor undertakes at any time after the security becomes enforceable, upon the first written demand by the bank, to forthwith vacate the mortgaged properties and shall ensure that all other occupiers of the mortgaged property shall forthwith vacate the mortgaged property.

As a matter of fact the Respondent Company has not resorted to clause 8.17 in this matter. The demand letter is merely notice to the Applicant under the provisions of section 19 of the Mortgage Act 2009 giving the Mortgagor 45 days within which to rectify the default failure for which the Mortgagor would exercise any of its statutory powers which are spelt out in the demand letter of August 2015 annexure "J" to the affidavit in support of the application. In other words any action challenging the above clause 8.17 is an action challenging the mortgage deed which was executed by both parties. It is not an action challenging the acts of the Respondent because there is none disclosed in the application.

Section 19 of the Mortgage Act merely provides that where money secured by a mortgage under the Act is made payable on demand, a demand in writing shall create a default in payment. Secondly it provides that where the Mortgagor is in default of any obligation to pay the principal sum on demand or interest or any other period of payment or any part of it due under any mortgage or in the fulfilment of any covenant or condition, express or implied in any mortgage,

the Mortgagee may serve on the Mortgagor a notice in writing of the default and require the Mortgagor to rectify the default within 45 working days.

The notice of 45 days is expressly in line with section 19 (2) of the Mortgage Act 2009. In the application itself, the fact that the Applicant is in default of paying its monetary obligations to the Respondent is not in dispute. The right to serve the notice is a statutory right and cannot be challenged on its own. That would in my view not disclose a prima facie case or an arguable case fit for trial.

In paragraph 13 (a) of the affidavit in support of the Applicant, the deponent further asserts that the facility letters contained terms regarding interest rates which are vague and speculative as to provide that: "interest is subject to change in line with market forces at the sole discretion of the bank". It is not indicated anywhere that the Respondent actually charged interest at its sole discretion in line with the market forces to the grievance of the Applicant. In the absence of any facts disclosing the cause of action to support the assertion that the Respondent did in its sole discretion charge interest to the detriment of the Applicant, such a suit would be a challenge to the provisions of the facility letter which was accepted by the Applicant. Even if the Applicant's succeeded in having the clause or clauses struck out, it is of no consequence to the question of whether the Applicant is in default and the entitlement of a Mortgagee to issue notice on a defaulting Mortgagor.

The Applicant also asserted that the offer letter and master credit terms are unlawful, manifestly unfair and unjust and they offend the Bank of Uganda Consumer Protection Guidelines. The Applicant has not proved by affidavit or otherwise which provisions of the offer letter and master credit terms are unlawful or manifestly unfair and unjust and which offend what part of the Bank of Uganda Consumer Protection Guidelines 2011 on treating the customer fairly. Order 41 rule 1 requires an Applicant to prove by affidavit or otherwise its entitlement to an injunction. The affidavit does not disclose the necessary facts disclosing a cause of action. And there are no grounds for the court to consider whether there is a prima facie case of unlawfulness or unfairness or injustice in the offer letter and master credit terms. In an application for temporary injunctions the facts disclosing a cause of action should be both in the chamber summons and the grounds thereof as well as in the affidavit unless it is proved otherwise i.e. through admission of facts etc or at the hearing and a temporary injunction sought. The Supreme Court considered a

cause of action under article 137 of the Constitution in the case of in **Attorney General vs. Tinyefunza Constitutional Appeal No. 1 of 1997** and Judgment of Wambuzi, C. J Page 18 – 19 quoting Mulla on the Indian Code of Civil Procedure, Volume 1, and 14th Edition at page 206 that inter alia a cause of action means:

“every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant.

In suits such facts are alleged in the Plaint according to the case of **Attorney General vs. Oluoch [1972] EA 392**. Finally it was held in **Jeroj Shariff & Co vs. Chotai Family Stores (1960) EA 374** that in deciding whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint and assumes that the facts alleged in it are true. In an interlocutory application the cause of action is not only disclosed in the pleading i.e. the Chamber Summons but the facts or evidence in support thereof should disclose a prima facie case or an arguable case which merits serious judicial considerations. I adopt for this holding the ruling of the Court of Appeal of Kenya in an appeal concerning considerations for establishing a plausible defence. They said in **Corporate Insurance Co. Ltd. v. Nyali Beach Hotel Ltd [1995-1998] EA 7** that leave to defend will not be given merely because there are several allegations of fact or of law made in the Defendant’s affidavit. The merits of the issues are investigated to decide whether leave to defend should be given. Sometimes the prima facie issues which are preferred can be rejected as unfit to go to trial because by their very nature and as disclosed they are incapable of constituting a defence to the claim.

The issue here by analogy is whether there are genuine issues which should go for trial. In the words of Lord Diplock in **American Cyanamid Co Ltd versus Ethicon [1975] 1 All ER at page 504** what needs to be established is whether the claim is not frivolous or vexatious. For that reason I will consider the serious allegation of infringement of fundamental rights.

It is alleged for the Applicants that section 20 (c), (d), and (e) of the Mortgage Act 2009 contravenes article 26 of the Constitution of the Republic of Uganda and should be declared unlawful. This allegation is not related to any particular facts but is a challenge to the law and

may as well be brought under article 137 of the Constitution of the Republic of Uganda. In case it is obvious and a matter of enforcement under article 50 of the Constitution, I will consider it briefly.

Section 20 (c) of the Mortgage Act 2009 provides that where the Mortgagor is in default and does not comply with the notice served on him or her under section 19, the Mortgagor may lease the mortgaged land or where the mortgage is of a lease, sublease the land. Just like the power of sale of a Mortgagee, the power to manage the property mortgaged includes the power to lease the property. The essence of any security arrangement with a bank is that the bank would be able to apply the security towards realising its monies. I do not see a prima facie case with any likelihood of success in that assertion in terms of enforcement of fundamental rights or the allegation that the section is unconstitutional. I also do not see any triable issue that merits serious consideration by a court of law. In fact the assertion is frivolous and vexatious for the reasons given below.

Section 20 (d) of the Mortgage Act 2009 also provides that where the Mortgagor is in default and does not comply with the 45 days notice to rectify the default, the Mortgagee may enter into possession of the mortgaged land. Similarly section 20 (e) of the Mortgage Act 2009 provides that where the Mortgagor is in default and does not comply with the 45 days notice to rectify the default upon being served with the notice, the Mortgagor may exercise the power to sell the mortgaged land.

It is the Applicant's assertion that those provisions contravene article 26 of the Constitution of the Republic of Uganda which prohibits the taking over of property without compensation. I have already noted that the provisions of the contract in the mortgage deed are contractual and executed by both parties. Secondly it is well established that the essence of the pledging of property as security by necessary implication gives power to the Mortgagee to control the property for purposes of realising its money upon default of the borrower. This is the essential function and purpose of collateral used as security in the banking industry. I further refer to in a few other authorities about the agreement contained in the mortgage deed to have property sold upon default by the Mortgagor. Starting with the preamble to the Mortgage Act 2009, it is an Act inter alia meant to consolidate the law relating to mortgages; to provide for the creation of

mortgages; for the duties of Mortgagors and Mortgagees regarding mortgages; to make mortgages take effect only as security; etc.

Section 2 of the Mortgage Act 2009 which is the interpretation section of the Act defines a mortgage to include:

“any chargeable lien of land or any estate or interest in land in Uganda for securing the payment of an existing or future or a contingent debt or other money or money’s worth or the performance of an obligation and includes a second or subsequent mortgage, a third-party mortgage and a sub mortgage”.

Secondly the word "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.

Furthermore, the essence of the relationship between Mortgagee and Mortgagor concerning the lending/borrowing of money is considered in **Matex Commercial Supplies Ltd and Another vs. Euro Bank Ltd (in liquidation) [2008] 1 EA at page 216** that any property whether a matrimonial home or a spiritual house offered to a bank as security for a loan is made on the understanding that the property stands the risk of being sold by the lender if default is made on the payment of the debt secured. Where a borrower agrees that a particular property is suitable as security, it cannot plead that the property has sentimental value.

In the case of **Maithya vs. Housing Finance Company of Kenya and another [2003] 1 EA 133** it was held that loss of property by a sale is contemplated by the parties even before signing the mortgage by the very fact of having the securities valued before the transaction of lending. These principles were followed and applied by this court in **HCMA No 614 of 2012 (arising from HCCS No. 455 of 2012) Kakooza Abdullah vs. Stanbic Bank (U) Ltd** and **HCMA No. 202 of 2012 arising from HCCS No. 152 of 2012 between David Luyiga and Messrs Stanbic Bank (U) Ltd.**

The very essence of pledging property as security is to hand it over to the bank in the event of default so that the bank can secure its money by either managing the property through taking possession thereof and collecting rent, leasing the property or through sale. An action

challenging the constitutionality of section 20 of the Mortgage Act 2009 which gives the right of the Mortgagee in the event of default literary means a challenge to the system of using mortgages as security and challenges the heart of the business of Financial Institutions in this country. Such an action is not only frivolous and vexatious but cannot be entertained by the commercial court whose mandate is to deal with inter alia banking, negotiable instruments, international credit and similar financial services under the Constitution (Commercial Court) (Practice) Directions S.I Constitution 6 and rule 4 (1) (b) thereof. In the premises there is no prima facie case or a serious dispute to be tried as far as the constitutionality of section 20 of the Mortgage Act is concerned.

I have also considered the assertion in paragraph 14 of the affidavit in support of the application which is deposed to in the alternative and without prejudice to matters disclosed in paragraph 13 of the affidavit. This provided that it was premature, unreasonable and defeats the intention of the parties for the Respondent to recall the total outstanding loan of Uganda shillings 18,234,685,082/= plus US\$7,763,305.04.

I have carefully considered the notice issued to the Applicant annexure "j" to the affidavit in support of the application. The fact that the entire loan is recalled is semantics. The essence of a notice under section 19 (2) of the Mortgage Act 2009 is to give the Mortgagor an opportunity to be notified of his or her default. Upon the default being established, the Mortgagor is entitled to 45 days notice to rectify the default. The statutory provision clearly envisages two things before a Mortgagee may exercise any of the remedies provided for in the subsequent section 20 which specifically applies to remedies of the Mortgagee. First of all where money is secured by a mortgage under the Act, a demand in writing shall create a default in payment. The Applicant has not challenged any demand in writing alleged by the Respondent in the affidavit in reply and does not oppose the fact that it is in default (see section 19 (1)). Secondly where a Mortgagor is in default of any obligation to pay the principal sum on demand or interest or any other periodic payment or any part thereof, the Mortgagor is entitled to being given a notice of 45 days to rectify the default. This is the essence of the letter served on the Mortgagor. Upon failure to rectify the default, the Mortgagee would be entitled to exercise any of the remedies provided for under section 20 of the Mortgage Act 2009. In other words recalling the entire loan is a mere language or style of writing of the Respondent's lawyers. The Respondent complied with the provisions of the statutory law. The statutory law permits the Mortgagor to exercise any of the

remedies under section 20 of the Mortgage Act 2009 which include requiring the Mortgagor to pay all monies owing on the mortgage. Secondly appointing a receiver of the income of the mortgaged land; thirdly leasing the mortgaged land or where the mortgage is of a lease, sublease the land. Fourthly it gives it the right to enter into possession of the mortgaged land and lastly it gives the Mortgagee power to sell the mortgaged land. All the remedies of the Mortgagee can only be exercised upon failure of the Mortgagor to rectify the default upon notice to the Mortgagor having been given under section 19 of the Mortgage Act 2009. The letter itself even if considered illegal, there are no facts disclosing that the Respondent breached the provisions of the Mortgage Act. In any case the remedies which include the power of sale mean that the Mortgagee is entitled to realise the entire outstanding amount and whatever the lawyers said in their letter does not take out or add to the statutory remedy.

Concerning the failure to serve the other Applicants, it is not the Respondent who has come to court. There is no evidence in the affidavit that the Respondent has moved against any of the Applicants under section 20 of the Mortgage Act 2009. Subsequently it has been disclosed that the second and third Applicants have also been served with the statutory notices. Failure to serve the Applicants is not prejudicial unless and until the rights of the Mortgagee envisaged under section 20 of the Mortgage Act have been or are threatened to be exercised without compliance with section 19 of the Mortgage Act 2009.

In the premises I agree with the Respondent's submissions that the Applicant's application does not disclose a prima facie case or disclose serious questions that would merit judicial consideration in the main suit.

I must further observe that the exercises of the remedies of the Mortgagee are further controlled by statutory safeguards. For instance rule 13 of the Mortgage Regulations 2012 which both parties submitted about enables the Applicant to apply to the court to stop any threatened sale after the requisite notices for sale of the property have been advertised. For the moment the situation has not arisen as there is only an intended action upon default to rectify the default. The court should not saddle the operation of the Mortgage Act 2009. There is thus far no reason to seek to stop anything under the Mortgage Regulations. This is primarily because the Respondent merely gave a statutory notice to rectify a default within 45 days in August 2015. A suit was

filed on the 14th of October 2015 before the 45 days expired and an interim injunction was issued on the 4th of November 2015.

In the premises the Applicants application lacks merit and is dismissed with costs.

Ruling delivered on the 15th of April 2016 in open court

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Charles Nsubuga Counsel for the Applicants

Counsel Idoot Augustine, for the Respondent

Human Resource/Legal Manager of the Applicant Mr. Hilal Hussein

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge-

15 April 2016