

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

MISCELLANEOUS APPLICATION NO 1000 OF 2015

- 1. WILLIS INTERNATIONAL ENGINEERING AND CONTRACTORS LTD}**
- 2. GEORGE WILLIAM KIYEGA}.....APPLICANTS**

VERSUS

DFCU BANK LIMITED}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicants commenced this application under the provisions of Section 98 of the Civil Procedure Act, Cap. 71 and Order 41 rules 1 and 9 of the Civil Procedure Rules, S.I 71-1 and is for a temporary injunction order to issue against the Respondent, its agents, servants, assignees and anyone acting under the authority of the Respondents restraining them from selling or interfering with Plaintiff’s use and occupation of the land comprised in Block 265, Plots 7346 and 7347 at Bunamwaya pending final determination of the main suit and for costs of the application.

The Applicant is represented by Messrs Tumusiime, Kabega and Company Advocates while the Respondent is represented by Messrs KSMO Advocates.

The grounds of the application are that the first Applicant is the Mortgagor of land comprised in Blok 265 Plots 7346 and 7347 at Bunamwaya, while the second Applicant guaranteed the loan and is the registered proprietor of the property. The Applicants requested the Respondent to restructure the loans but the Respondent refused and declared one of the loans a non – performing asset thereby making it attract exorbitant fines and penalties to the Applicant’s detriment. On the 17th of November 2015 the Respondent and its agents served the Applicant

with a notice of sale after 21 days. The Respondent has no justifiable basis for their action and the Applicants have suffered and shall continue to suffer irreparable loss if the injunction order is not granted. Finally the Applicant avers that it is just and equitable that the application is granted. The application is supported by the affidavit of George William Kiyega the 2nd Applicant and Managing Director of the 1st Applicant as well as the Guarantor of the loan. He deposed that he was periodically making deposits on the 1st Applicant's Mortgage account in the Respondent's bank but to his dismay the loan was declared a non-performing asset thereby making it attract exorbitant fines and penalties to the Applicants' detriment. He admitted that in June 2014, the 1st Applicant sought a bank guarantee from the Respondent/Defendant for execution of a Contract No UDC/WRK/2013-2014/00089 and Plot 7346 was the security. The Respondent released the Performance Guarantee long after the contract had expired even upon being notified that it was no longer necessary. The Respondent illegally registered a mortgage on land which was never offered to the Respondent and without the Applicant's consent. On 17th November 2015, the Respondent served the Applicants with a notice of sale after 21 days without any legal basis for the intended sale. The property is the main source of the second Applicant's livelihood and that of his family. There is no legal basis for the intended sale and the actions of the Respondent are not only illegal but also fraudulent. The Applicants accordingly filed a suit against the Respondent which suit has a good prospect of succeeding. The rest of the deposition repeats the averments in the chamber summons and need not be repeated.

The affidavit in opposition is that of Pious Olaki the Legal Manager of the Respondent who deposes that the 1st Applicant between June and November 2014, obtained loan facilities from the Respondent comprised of a Contract Finance Facility of Uganda shillings 220,000,000/=, a Performance Bond Facility of Uganda shillings 73,449,366 and a Medium Term Loan Facility of Uganda shillings 200,000,000/= to which they agreed that the payments be secured by a mortgage of the land comprised in the names of the 2nd Applicant as personal Guarantee. The Respondent presented the mortgage deeds to the Registrar of Titles for registration of its mortgage but the Registrar in error registered a mortgage on the title of Kyadondo Block 265 Plot 7347 at Bunamwaya instead of Kyadondo Block 265 Plot 7346 and both the Registrar and the Respondent did not notice this error before the present suit was instituted. The Respondent did not receive a request from the Applicant to release the mortgage erroneously registered on

the title Kyadondo Block 265 Plot 7347. The Applicants did not service the above loan facilities as agreed and do not deny their indebtedness to the Respondent and owe the Respondent Uganda shillings 416, 764, 552/= secured by the land comprised in Kyadondo Block 265 Plot 7346 at Bunamwaya. The Respondent accordingly commenced recovery measures that prompted the Applicants to file the main suit. The Respondent has a valid mortgage registered over the land comprised on Kyadondo Block 265 Plot 7346 to secure the borrowings.

The court was addressed in written submissions by Counsel.

Counsel for the Applicant submitted that for a temporary injunction to be granted it has to satisfy three conditions laid down in the cases of **Tumusiime Nasur vs. Magandanzi Abbey & Anor MA 971/2015 arising from civil Suit No. 77 of 2015** and the case of **Giella vs. Cassman Brown & Co. Ltd (1973) EA 358 at 360**. They are as follows:

That the Applicant must establish that there is a prima facie case with a possibility of success. Secondly the Applicant would suffer irreparable damage if the order is not granted. Thirdly if the court is in doubt on the first two conditions, it will decide the case by weighing the balance of convenience as between the parties and as held in **Sekitoleko and others vs. Mutabazi and two others Civil Appeal No. 65 2001** and in **Kiyimba Kaggwa vs. Katende (1985) HCB 43**. Furthermore it was held by the High Court inter alia that the granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve the status quo until the question to be investigated in the suit can be finally be disposed of.

On whether the Applicants have a prima facie case against the Respondent, Counsel for the Applicant relied on **Amos Rwamashondi vs. Gatrida Nalwoga and Another, Miscellaneous Application No. 774 of 2011** where the High Court held that it means the existence of a triable issue or a serious question to be tried that is an issue which raises a prima facie case for adjudication.

In the case of **Nasser Kiingi and another vs. Attorney General and others Constitutional Application No. 29 of 2011 at page 17**, The Constitutional Court held that with regard to the condition of whether a prima facie case with a probability of success is disclosed, the court must be satisfied that the suit is not frivolous and vexatious, that there is a serious question to be tried.

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

From the above premises failure to give notice of entering a mortgage on the Applicant's property and to require consent as stated in paragraph 5 of the 2nd Applicant's affidavit in support of the application is contrary to **Section 4(1) (a) and (2) of the Mortgage Act, 2009** which provides that any party to the mortgage must act in good faith. Failure to disclose information by any of the parties to the mortgage can be construed as fraud as held in **Fredrick Zzabwe vs. Orient Bank and 4 others, Civil Appeal No. 4 of 2006**. The Applicant's Counsel further submitted that the registration of a mortgage on Block 265 Plot 7347 under instrument KLA565080 is a dishonest dealing and a fraudulent act which justifies the institution of this suit and that there exists a prima facie case with a possibility of success.

On whether the Applicants will suffer irreparable injury if no temporary injunction is granted, Counsel relied on **Amos Rwamashodi vs. Gatrida Nalwoga and another Miscellaneous Application No. 774 of 2011** for the position that irreparable injury means injury that cannot adequately compensated in damages and that the injury must be substantial or material (See **Kiyimba Kaggwa vs. Hajj Katende HCB 43**). This is dependent on the remedy being sought and if the damages cannot adequately atone for the injury, an injunction ought not to be refused. Irreparable injury does not mean that there must not 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 by an award of damages.

With reference to the facts the Applicants Counsel submitted that the property in issue is the main source of the livelihood of the second Applicant and his family. Failure to grant the injunction and protect the suit property would render the suit nugatory and the Applicants will suffer irreparable damage. Any financial compensation would not be an adequate solace to atone for the sale of the suit property considering the remedies sought are a declaration that the Respondent has no legal right to sell the suit property and an order directing the Defendant to release the mortgage on the suit property among others. The property if sold will leave the 2nd Applicant and his family in a desperate situation in terms of their wellbeing and survival. Further that if the suit property is sold the Applicants will suffer irreparable injury.

On whether the balance of convenience is in favour of the Applicant, the Applicant's Counsel relied on **GAPCO Uganda Limited vs. Kaweesa Badru and Another Miscellaneous**

Application 259 of 2013, where balance of convenience was defined to mean that if the risk of doing an injustice is going to make the Applicants suffer, the court would most likely be inclined to grant the Applicant's application for a temporary injunction. Where there is need to preserve the status quo, the Applicant must show the balance of convenience is in his favour.

In the case of **Amos Rwamashodi vs. Gatrida Nalwoga and another Miscellaneous Application No. 774 of 2011** it was held that the status quo is not about who owns the suit property "but the actual state of affairs on the suit premises prior to the filing of the main suit. The subject matter of a temporary injunction is the protection of legal rights pending litigation. The duty of the court is to protect the interests of the parties pending the disposal of the suit. In exercising this duty, court does not determine the legal rights to the property but merely preserves it in its actual condition until legal title or ownership can be established or declared".

With reference to the facts the Applicant's Counsel submitted that the Respondent registered an illegal mortgage in land comprised in Block 265 Plot 7347 and without consent of the Applicants and that the issuance of the notice of sale of the said land as per paragraph 6 of the affidavit in support of the application was also unlawful. The Applicants have been servicing the loan with the Respondent bank and were surprised when one of the loans was declared to be non-performing thereby making it attract exorbitant fines and interest to the detriment of the Applicant and that the Respondent refused to listen to the Applicant's request to restructure.

In reply the Respondent's Counsel submitted that the Applicants are not entitled to a grant of a temporary injunction to stop the sale of the mortgaged property because they have no prima facie case against the Respondent. He relied on **David Luyiga vs. Stanbic Bank (U) Ltd H.C.M.A 202 of 2012** where the court cited with approval **American Cyanamid Co. Ltd vs. Ethicon (1975)1 All E.R. 504 at page 510** that the Applicant must show that there are serious questions to be tried and that the action is not frivolous or vexatious.

The Respondent's Counsel objected to the Applicant's submissions that the registration of a mortgage over the subject land was a dishonest and fraudulent dealing and that the Applicants were in the know and they acquiesced to the registration of the mortgage on Block 265 Plot 7347. The legal manager of the Respondent in the affidavit in reply deposed that the Respondent

never at any time received a request from the Applicant for the release of the Mortgage erroneously registered on the title of the suit land. Secondly the Applicants did not service the loan facilities advanced to them by the Respondent as agreed.

In any case the Respondent has a valid mortgage registered over the land comprised in Kyadondo Block 265 Plot 7346 at Bunamwaya and the sale against which this injunction is sought is being pursued rightfully in accordance with **Section 26 of the Mortgage Act No. 8 of 2009**. In the premises the Applicant's application does not disclose a prima facie case and their claims are frivolous and vexatious and they are not entitled to a temporary injunction order sought in the application.

The Respondent's Counsel also submitted that the Applicant would not suffer irreparable injury and relied on the Kenyan case of **Maithya vs. Housing Finance Co. of Kenya and Anor (2003)1 EA 133 at 139-140**, for the proposition that loss of property by sale is clearly contemplated by the parties even before the security is formalized. Counsel further submitted that damages would be an adequate remedy especially given the fact and it has not been suggested that the Respondent cannot pay damages should it become necessary. In the case of **Herbert Kabunga Traders vs. Stanbic Bank (U) Ltd H.C.M.A No. 159 of 2012** Hon Justice Helen Obura held that those who come to equity must do equity and agreed that failure to service the loan or to pay the lender takes the Applicant outside the realm of the exercise of the court's jurisdiction to grant a temporary injunction.

The Applicants failed to service the loans advanced to them and they should not be seen to invoke the sentimental value of the property as the subject property was mortgaged as security for the loan advanced to them by the Respondent and Respondent is willing and able to pay the value of the property in case the Applicants are successful in the main suit.

On balance of convenience, the Respondents Counsel submitted that it tilts in favour of the Respondent not Applicants and relied on **Kisembo vs. Standard Chartered Bank (U) Ltd H.C.M.A No. 344 of 2014**, where Hon Lady Justice Elizabeth Musoke held that in the private sector, it is in the interest of the market economy that contractual relations are regulated by the contracts which brought them into existence or the relevant statutes. The banking sector is a very

sensitive one which should not be unnecessarily burdened with injunctions, where there are no strong grounds for doing so.

The Applicants have do raised any strong grounds for the grant of a temporary injunction and the bank is only exercising its right of sale upon default by the Applicants and it would be unfair to grant it to the detriment of the Respondent.

The Respondents Counsel alternatively prayed that the Applicants should pay 30% of the forced sale value of the mortgaged property at the time of grant of the temporary injunction. He submitted that according to **Regulation 13(4) of the Mortgage Regulations**, where a sale is stopped at the request of the Mortgagor or any other interested person, such person shall at the time of stopping the sale pay to the person conducting the sale, a security deposit of 30% of the forced sale value of the mortgaged property or of the outstanding amount, whichever is higher. He also cited the case of **Miao Huaxian vs. Credit Bank Ltd and Anor H.C.M.A No. 935 of 2015** where it was held that the provision for the deposit of 30% or 50% upon the application or request of the Mortgagor is mandatory.

In the event the court grants the injunction the Applicant is required by law to make a mandatory deposit of the forced sale value of the mortgaged property comprised in Block 265 Plot 7346 at Bunamwaya or of the outstanding amount whichever is higher. The deposit should be made in one instalment at the time of granting the injunction. In the case of **Hajji Edirisa Kasule vs. Housing Finance H.C.M.A No. 667 of 2013** the court emphasized the justification for the deposit of the 30% being to offer the bank an equitable remedy for purposes of security in case the order for the injunction is made.

In rejoinder, the Applicants Counsel submitted that the court should disregard the Respondent's proposed alternative to the grant the application upon the Applicant's payment of 30% of the forced sale value of the mortgaged property or of the outstanding amount whichever is higher.

On the alleged erroneous registration of a mortgage on the title of the land, it is not the duty of the Applicants to inform the bank to release a mortgage erroneously registered on the title for Block 265 Plot 7347.

In response to the Respondent's submission on **Section 26 of the Mortgage Act 2009**, prior to the execution of the powers to sell, there must be in existence a legal mortgage and that the mortgage entered by the Respondent cannot be a legal mortgage because their actions are contrary to **Section 3 and 4 of the Mortgage Act 2009**.

That **Section 3** provides for power to create a mortgage and only a person holding the land under any land tenure has the capacity to create a mortgage and the registered proprietor being the 2nd Applicant, his consent prior to registration of the mortgage should have been sought failure of which is contrary to **Section 4 of the Mortgage Act 2009**. That in the circumstances the mortgage was erroneous and illegal which made the notice of sale illegal as well and that the Respondent's non-disclosure of information relating to the mortgage amounts to fraud as defined in **Fredrick Zzabwe vs. Orient Bank and 4 others, Civil Appeal No. 4 of 2006**. There arises questions as to whether the intended sale of the suit land is genuine and there is a prima facie case.

In response to the Respondent's submissions that Applicant would not suffer irreparable loss, the Applicant's Counsel submitted that the state of affairs pending payment of damages is potentially torturous and worrying as the 2nd Applicant and his family may lack the basic needs of life and other essential requirements of life which cannot be atoned for by an award of damages.

On the issue of the balance of convenience tilting in favour of the Respondent, the actions of the Respondent in entering the mortgage without notice to the Applicant constitutes an act of non-disclosure of information contrary to **Section 4 of the Mortgage Act 2009** which implies that the mortgage is illegal and erroneous in the circumstances.

They also cited the case of **Manana Francis vs. Waniaye Khatuli Kenneth and 2others H.C.M.A 7 of 2013**; it was held that an illegality once brought to the attention of court cannot be condoned. The Respondent cannot purport to rely on the provisions in the **Mortgage Regulations 2012** in relation to an erroneous mortgage in issue for no legal proceedings can be premised on an illegal action and the injunction ought to be granted.

Ruling

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

I have carefully considered the Applicant's application, the affidavit evidence as well as the documentary evidence attached, the submissions of Counsel and the laws cited.

Starting with the facts, the Applicant seeks a temporary injunction to restrain the Respondent bank from selling; interfering with the Plaintiff's use and occupation of land comprised in block 265 plot 7346 and 7347 at Bunamwaya until the final determination of the main suit.

In the affidavit in reply by Mr Pious Olaki, the legal manager of the Respondent, deposed that the loan facilities were secured by a mortgage of land comprised in Kyadondo block 265 plot 7346 described above and in the names of the second Applicant/Plaintiff as well as by a personal guarantee of the second Applicant/Plaintiff. In paragraph 5 of the affidavit in reply he deposes that the registrar of titles in error registered a mortgage on the certificate of title for land comprised in Kyadondo block 265 plot 7347 described above. Furthermore in paragraph 6 of the affidavit he deposes that prior to filing the suit the Respondent did not receive a request of the Applicant for release of the mortgage erroneously registered on plot 7347 for the release of the title. The Respondent did not notice this error before the suit was instituted by the Plaintiffs.

He contended that in the affidavit in reply that the Applicants claim relating to this title is misconceived and the suit was unnecessary. I have accordingly considered the pleadings in the plaint where the Plaintiff is alleging illegality by holding the Plaintiffs title in respect of block 265 plot 7347 described above.

The affidavit in reply is an admission that Kyadondo block 265 plot 7347 was not supposed to be encumbered by a mortgage as has been done by the Respondent. In other words the Respondent bank agrees that the mortgage encumbrance entered on the title deed ought to be discharged and the title released to the Applicants. Without prejudice to the claims in the suit and any other remedy which may accrue to the Plaintiff/Applicants with regard to the alleged erroneous registration of a charge on plot 7347, there is no need to make an order of a temporary injunction pending determination of the main suit with regard to this particular plot because the Respondent admits that the land in the very least should not be encumbered by any mortgage interest and that the registration of the mortgage as was done is erroneous.

Before concluding the matter I have carefully considered the amended plaint and paragraph 4 thereof which avers as follows:

"The Plaintiffs bring this suit against the Defendant seeking declaratory orders that the Defendant is illegally holding the Plaintiffs title in respect of land at Bunamwaya Kyadondo block 265 plot 7347 and has illegally encumbered it with a mortgage, a permanent injunction restraining the Defendant and or any of their servants/agents from interfering with the Plaintiffs ownership and peaceful use of the land, general damages and orders to stop an illegal sale of property in block 265 plot 7346 and costs of the suit."

The question as to whether the Defendant/Respondent is illegally holding the Plaintiffs title and has illegally encumbered it with the mortgage has not been admitted. What is admitted is that the said plot 7347 ought not to have been encumbered by a mortgage. The question of whether the registration of a mortgage on Plot 7347 is unlawful or illegal remains a matter for determination in the suit.

In the premises the mortgage encumbrance on the title of land at Bunamwaya described as Kyadondo block 265 plot 7347 shall be released and the title thereof handed over to the Applicants/Plaintiff's free of any encumbrance. This order is made pursuant to Order 13 rules 6 of the Civil Procedure Rules. The rest of the claims with regard to the alleged illegality of the mortgage remain the subject matter of the main suit.

With regard to the application for a temporary injunction what remains for trial is the Plaintiffs claim to stop the alleged illegal sale of property in block 265 plot 7346.

The Respondent contends that the property namely Kyadondo block 265 Plot 7346 was lawfully encumbered by a mortgage. It is alleged by the Respondent that the basis of the encumbrance was that between June and November 2014 the first Applicant obtained a loan facilities from the Respondent. This was a contract finance facility of Uganda shillings 220,000,000/=, a performance bond facility of Uganda shillings 73,449,366; and a medium-term loan facility of Uganda shillings 200,000,000/=. It was agreed that the loan would be secured by the property comprised in Kyadondo block 265 plot 7346 at Bunamwaya. This assertion is supported by the

relevant documents. On the other hand the Applicant's assertion is that it is the Mortgagor of the land and the second Applicant is the guarantor of the mortgages.

In the grounds in support of the application the Applicant's grievance is that it had requested the Respondent to restructure the loan but the Respondent turned down the request and declared one of the loans to be a non-performing asset making it incur exorbitant fines and penalties to the Applicant's detriment. Secondly the Applicants are aggrieved that on 17 November 2015, the Respondent and its servants served the Applicant with a notice of sale after 21 days. The Applicants assert that the Respondents have no justifiable legal basis for this action. Fourthly it is averred that the Applicants have suffered and shall continue to suffer irreparable loss and damage if the temporary injunction is not granted. Finally that it would be just and equitable in the circumstances to grant a temporary injunction. I have further considered the affidavit in support of the application by George William Kiyega the Managing Director of the first Applicant as well as the second Applicant to the application. He deposes on behalf of the first Applicant he had been making deposits on the first Applicant mortgage account with the Respondent but to his surprise the Respondent declared one of the loans to be a non-performing asset making it to incur exorbitant fines and penalties to the Applicant's detriment. The particulars of the penalties have not been given. Secondly he deposes that the first Applicant sought a bank guarantee from the Defendant for execution of the said contract described in the application where plot 4736 was used as security. The Defendant however released a performance guarantee dated 3rd of November 2014 long after the contract had expired and even after the Respondent notified that it was no longer required. The affidavit makes reference to letters dated 14th of October 2014, 29th of September 2014 and a performance guarantee dated 3rd of November 2014 but these documents are not annexed to the affidavit.

There is no controversy about the principles applied by the court is in considering whether to grant a temporary injunction. I particularly refer to the case of **Giella versus Cassman Brown and Company Limited [1973] EA 358** that the Applicant must establish that it has a prima facie case with a possibility of success. Secondly it must be shown that the Applicants would otherwise suffer irreparable damage if the injunction order is not granted. Thirdly if the court is in doubt on the first two grounds, the court considers the balance of convenience. On the first

principle reference is also made to the case of **American Cyanamid versus Ethicon Ltd [1975] 1 All ER 504**, where the dictum of Lord Diplock has been variously applied in several decisions by this court. It proposes the condition that the Applicant must show that there are serious questions to be tried and that the action is not frivolous or vexatious.

Lastly the court must consider the statutory provisions governing mortgages under the Mortgage Act, Act 8 of 2009 as well as the Mortgage Regulations 2012.

Since the promulgation of the mortgage regulations an issue arises as to whether an injunction should be granted conditionally and specifically upon a deposit of security described therein where the intention of the injunction is to stop the sale of the mortgaged property as it will be in almost all applications for injunctions save for those to stop exercise of other remedies such as appointment of a receiver to manage the mortgaged property or take possession thereof.

Going back to the facts of the case, upon the concession of the Respondent in the affidavit in reply that one of the plots is not supposed to be security and that it was erroneously encumbered, the issues that remain for trial are those dealing with any consequential relief that the Applicants may be entitled to upon an encumbrance being registered on plot 7347. That is not the subject matter of an injunction and an order has already been made for the release of the title to the Applicant free of any encumbrances by the Respondent.

The actual remainder of the suit in terms of controversial fact with reference to the need, if at any, for a temporary injunction relates to the pleading that there is an intended sale of block 265 plot 7346 and for costs of the suit. In the plaint what is disclosed is an admission that the first Plaintiff is a customer of the Defendant. The second Plaintiff is the Managing Director of the first Applicant and owner of the security the subject matter of the application for injunction. It is only in paragraph 5 (h) of the amended plaint that the Plaintiff avers that on 17 November 2015 they were served with notice of intention for sale of property valued at over Uganda shillings 2,000,000,000/=. In paragraph 6 the Plaintiff admits that sometime in July 2012 they obtained a loan of about 318,000,000/= secured by plot 7346. It is alleged that the Plaintiffs paid the loan facility fully but Defendant which is the Respondent herein unlawfully continued to encumber the second Plaintiff's title. Because of the alleged illegal encumbrance the Respondent illegally

recovered bank charges from the Plaintiff up to a total sum of Uganda shillings 50,000,000/=. The other averments relate to illegal encumbrance on plot 7347.

The Defendants deny Plaintiffs claim and filed a counterclaim for recovery of Uganda shillings 416,764,552/=. The Respondent has been able to show that the first Applicant executed a contract finance facility of Uganda shillings 220,000,000/= on 30 June 2014 secured by a charge on the land and property Kibuga block 265 plot 7346. On 14 October 2014 the Respondent issued a performance bond facility of Uganda shillings 73,449,366 in addition to an existing facility of Uganda shillings 400,340,659/=. It was for facilitating execution of a contract with Uganda Development Corporation reference UDC/WRKS/2013-2014/00089. The documents are executed by both parties. By another facility letter dated 21st of November 2014, the Applicants executed another facility for purposes of equity release and working also secured by the same property. The document is executed by both parties.

In paragraph 4 of the affidavit in support of the application, the Applicants grievance in relation to plot 7346 concerns the execution of the contract in June 2014. The contract relates to the bank guarantee or a performance guarantee where the plot was used as security. The Applicants grievance is that the Defendant released the performance guarantee on the 3rd of November 2014 long after the contract expired even after the Respondent had been notified that the performance guarantee was no longer needed. Reference has been made to letters which I have failed to trace on court file. There are letters referred to and annexed to the pleadings of the parties in the main suit which include a facility letter dated 14th of October 2014 relating to performance bond facility of Uganda shillings 73,449,366. The document was attached by the Respondent in the written statement of defence and is not in dispute. It is executed by both parties and concerns the performance bond facility. The performance bond facility is in addition to existing exposure of Uganda shillings 400,240,659/=.

While there could be a controversy to be tried about whether the Applicant should be charged any fees in relation to the performance bond which was never cashed, the Applicant has not indicated what it has done in relation to the outstanding amount at the time of execution of the performance bond agreement. Secondly there is no evidence as to how this affected the

remittances for outstanding liabilities of the Applicants. The rest of the grievances relate to an admitted fact that plot 7347 ought not to have been encumbered with the mortgage charge.

In the absence of the triable issue relating to the liability of the Applicant or in the previous outstanding liability by the time of the contested performance bond, the court cannot assess whether the Applicant could have been able to pay its outstanding liabilities. It is imperative that the prima facie case or triable issues which merit judicial consideration in the main suit should be proved by affidavit or otherwise under Order 41 rule 1 of the Civil Procedure Rules. While it has been proved that the property in dispute is in danger of being alienated by the Respondent, it cannot be said that it has been shown that it is being wrongfully alienated, wasted or damaged by the Respondent. The loan agreement and the outstanding amounts are more probable a reality than not.

Last but not least where a Mortgagor wants to stop the sale of mortgaged property but does not show that there is no outstanding amount owing or a procedural irregularity in the statutory notices prior to the advertisement for sale of the mortgaged property regulation 13 of the Mortgage Regulations 2012 would be applied. The statutory requirements under the Mortgage Regulations override traditional considerations for the grant of a temporary injunction as I shall show hereunder. Before regulation 13 of the Mortgage Regulations 2012 is applied there has to be an application for relief by the Applicant in terms of section 33 of the Mortgage Act 2009. This section was considered by this court in **Wamono Shem v Equity Bank Limited and Anor HCMA No. 600 of 2012**. It was held that the head note of section 33 shows the intention of legislature in enacting the section and it is to give a right to a Mortgagor or other interested person to apply to court for relief against the exercise of the remedies of a Mortgagee upon default of the borrower. These remedies are provided for under section 20 of the Mortgage Act 2009. Section 33 provides that 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 by the Mortgagor among others. Where there is no suit for relief as such but a suit to free the property from the mortgage, the Applicant still claims relief from exercise of the remedies of a Mortgagee against a Mortgagor in default of payment of a loan. Sections 33 (3) and (4) of the Mortgage Act 2009 provides as follows:

“(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.”

Where there is an application for relief **regulation 13 of the Mortgage Regulations**, may be applied because it provides that a sale may be stopped or adjourned by court at the request of the Mortgagor. It would be irrational for a Mortgagor to apply to either adjourn the sale or stop it without trying to buy time to redeem the property or get any other remedy that is appropriate to a Mortgagor because the stoppage or adjournment is made upon payment of 30% of the outstanding amount or the forced sale value of the property. Regulation 13 provides as follows:

“Adjournment or stoppage of sale.

(1) The court may on the application of the Mortgagor, spouse, agent of the Mortgagor or any other interested party and for reasonable cause, adjourn a sale by public auction to a specified date and time upon payment of a security deposit of 30% of the forced sale value of the mortgaged property or outstanding amount.

What is a reasonable cause for the stoppage or adjournment of the sale has not been defined. However the provision supports a suit for relief from the exercise of remedies of a Mortgagee upon default of a Mortgagor under section 20 of the Mortgage Act which remedies include sale

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

of the mortgaged property. I do not have to consider the other remedies as it suffices to deal with the circumstances of the Applicant where the Mortgagee is seeking to sell the property. Wherever there is a suit for relief, there is a reasonable cause as a mortgage does not operate as a transfer of property but as security for borrowing. Regulation 13 (1) provides that the Court may stop the sale upon the payment of 30% of the forced sale value of the mortgaged property or outstanding amount. This rule was considered by the Court of Appeal of Uganda in **Ganafa Peter Kisawuzi vs. DFCU Bank Ltd Civil Application No. 0064 of 2016 arising from Civil Appeal No. 54 of 2016**. The court of appeal refused to grant an order of a temporary injunction to the applicant holding that the remedy was not available to him on the ground that the Applicant had not complied with regulation 13 (1) of the Mortgage Regulations 2012 which required him to deposit 30% of the forced sale value of the mortgaged property or the outstanding amount before stoppage of sale.

Regulation 13 (5) further provides that where the sale is stopped or adjourned at the request of the Mortgagor for the purpose of redemption, the Mortgagor shall at the time of stopping or adjourning the sale pay a security deposit of 50% of the outstanding amount.

The Mortgage Regulations 2012 were prescribed by the Minister of Lands under section 41 (1) of the Mortgage Act which gives the Minister powers by regulations to prescribe anything which may be prescribed under the Mortgage Act and generally for the better carrying into effect of the purposes and provisions thereof.

With regard to Kyadondo Block 265 Plot 7346 I am satisfied from the affidavit in support of the Application by George William Kiyega and paragraph 3 thereof that the first Applicant is indebted to the Respondent bank. Secondly there is no dispute about the fact that Plot 7346 was lawfully encumbered. The Applicant has not deemed it fit to rebut the affidavit of Pious Olaki the Legal Manager of the Respondent to the effect that the first Applicant owes the Respondent about Uganda shillings 416,764,552/-. Finally I reiterate the ruling in **HCMA No 202 of 2012 arising from HCCS No. 152 of 2012 David Luyiga vs. Stanbic Bank (U) Ltd** following the principles laid down in two Kenyan decisions. In the case of **Matex Commercial Supplies Ltd and another vs. Euro Bank Ltd (in liquidation) [2008] 1 EA at PP 216** it was held that any

property which is offered as security for a loan/overdraft is made on the understanding that the property stands at the risk of being sold by the lender if default is made on the payment of the debt secured. A party, who agrees that a particular property is suitable for purposes of security, cannot later plead that the property has sentimental value. I was also persuaded by the holding in **Maithya vs. Housing Finance Company of Kenya and another [2003] 1 EA at page 133** that property pledged as security is valued before the lending and loss of property by a sale is contemplated by the parties even before the security is formalised. In such cases an award of damages would be an adequate remedy.

In the premises the Applicants are in default and the Mortgagor has statutory rights it may exercise. To stop the exercise of that right the Applicant can be granted a conditional injunction upon the payment of the requisite security deposit prescribed by regulation 13 of the Mortgage Regulations 2012.

In the premises a conditional temporary injunction issues restraining the Respondent and/or its agents, servants, assignees and anyone acting under the authority of the Respondents from exercising the Respondents statutory power of sale or any other remedy in respect of land comprised in Block 265 Plot 7346 at Bunamwaya under the following terms and conditions:

1. The Applicant shall deposit with the Respondent 30% of the outstanding amount or forced sale value of Plot 7346 at Bunamwaya whichever is higher pending determination of the suit within 30 days from the date of this order. The 30% shall not take into account any charges relating to the controversial performance bond facility of Uganda shillings 73,449,366.
2. Should the Applicant fail to deposit the said 30% within the period stipulated the injunction shall lapse and the Respondent shall be at liberty to exercise its statutory power of sale under the Mortgage Act 2009.
3. If the first Applicant wishes to redeem the suit property, it shall pay 50% of the outstanding amount and continue servicing the loan.

4. Kyadondo Block 265 Plot 7347 shall be released by the Respondent to the Applicant free of encumbrances.
5. The costs of this application shall be borne by the Applicant.

Ruling delivered in open court on the 10th of June 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Richard Obonyo Counsel for DFCU Bank Ltd

Applicant's Counsel is absent

Parties are absent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

10th June 2016