

**THE REPUBLIC OF UGANDA,**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**HIGH COURT MISCELLANEOUS APPLICATION NO 76 OF 2016**

**(ARISING OUT OF H.C.C.S. NO. 78 OF 2016)**

**MIAO HUAXIAN}.....APPLICANT**

**VERSUS**

**1. CRANE BANK LIMITED}**

**2. NAMAGANDA LIMITED}.....RESPONDENTS**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Applicant commenced this application under the provisions of section 38 of the Judicature Act Cap 13 laws of Uganda, Order 41 rules 1, 2 and 9 of the Civil Procedure Rules for an injunction to restrain the Respondents/Defendants, their agents and (or) servants from evicting the Applicant from all the land comprised in Plot 47 LRV 274 Folio 25 Nabugabo Road, Kampala till the hearing and final determination of HCCS 78/2016. Secondly, it is for an order that the Applicant continues to enjoy quiet and peaceful possession of the suit premises until the hearing and final determination of HCCS 78/2016. Thirdly, the Applicant prays for costs of the application to be provided for.

The grounds of application set out in the chamber summons are that the Applicant firstly commenced civil proceedings against the Respondents/Defendants in the commercial division of the High Court of Uganda in HCCS number 78 of 2016 seeking among other things cancellation of the impugned sale, rectification of the certificate of title, a permanent injunction, declarations, general damages and costs of the suit. Secondly, the suit is neither frivolous nor vexatious. It raises triable questions of fact and law. Thirdly the Applicant will suffer damage that will be irreparable by an award of damages if an injunction is not issued to restrain the

Respondents/Defendants as prayed for. Fourthly, that the Applicants HCCS number 70 of 2016 will be rendered nugatory if an injunction is not issued to restrain the Respondents/Defendants as hereinbefore prayed for. Lastly, the Applicant avers that it is just and equitable that an injunction issues to restrain the Respondents/Defendants in the manner and terms herein above prayed for.

The application is supported by the affidavit of the Applicant sworn at Kampala on 8<sup>th</sup> February 2016, a supplementary affidavit sworn on 10<sup>th</sup> March 2016 and an affidavit in rejoinder sworn on 10<sup>th</sup> March 2016. In the first affidavit of 8<sup>th</sup> February 2016 the Applicant deposes that she is the registered proprietor of the suit property. On 23<sup>rd</sup> July 2013 the first Respondent granted her credit facilities in the amount of US\$800,000 and Uganda shillings 1,500,000,000/=. Interest rate was 12% per annum according to the agreement for the US dollars facility whereas the interest rate for the Uganda shillings facility was 24% per annum. The penal interest rate on both facilities was 36% per annum from representing a 200% and 50% increase the interest rate for the United States dollar and Uganda shillings facility respectively. The facilities were secured by the mortgage of the suit property. On 30<sup>th</sup> July 2014 the Defendant sanctioned an overdraft facility of Uganda shillings 70,000,000/= which was secured by a mortgage on the property is registered in the names of third parties. On 10<sup>th</sup> August 2015 the Applicant requested the Respondent that she makes a substantial payment of the credit facilities by paying the sum of Uganda shillings 3,650,000,000/= for the Respondent refused according to copies of correspondence attached. As a result of the disagreement the Applicant filed HCCS 743/2015 against the Respondent and Fit Auctioneers and Court Bailiffs. She also filed High Court miscellaneous applications: 14/16 and 743 and 935 of 2015 which were determined.

While the above matters were ongoing she was made aware of an advertisement in the New Vision of 24<sup>th</sup> December 2015 on behalf of the Defendant purporting to be made on the instructions of MMAKS Advocates giving notice of sale of the suit property by public auction/private treaty. She never received any of the requisite statutory notices that were required as a condition precedent for the sale of the mortgaged property as prescribed by law. He filed HCCS number 78/2016 and an application for interlocutory injunction 67/2016 arising there from against the first Respondent. The amended plaint in the above matter is to challenge the purported sale, cancel it and have the title rectified. Upon receiving an affidavit in reply to the

application she learnt that the first Respondent purportedly sold the suit property to the second Respondent for Uganda shillings 8,500,000,000/=.

The Applicant is still in possession of the suit premises. On the basis of advice of her lawyers she asserts that the advertisement and purported sale of the property was fraudulent and therefore unlawful for being without service of the notice of default on her or any of the persons of service of the notices is mandated.

Secondly, the Applicant deposes that the advertisement of the property covered space of less than a quarter of the page of the New Vision on Christmas eve bearing a very unprofessionally taken picture showing only part of the suit property falling short of the statutory requirements. It did not bring to the attention of persons likely to be interested and able to bid for the purchase of the property and as such was unlawful. On the basis of advice from Counsel she deposes that the sale of the suit property was in contravention of the Mortgage Act, 2009 and was fraudulent. The property was sold at a lower price than the value of the property. She had received an offer for the property at US\$3,300,000 equivalent to Uganda shillings 11,385,000,000/= from Nabukeera Ltd the company applied to the second Respondent and its directors. She made the offer unknown to the first Respondent rejected it for being below the property value.

The Applicant asserts that the Respondent has never carried out a valuation of the property for the past six months as prescribed by law. On the basis of advice of her Counsel, she deposes that a suit is neither frivolous nor vexatious and raises questions of law and fact which are triable. Secondly, no sale of the mortgaged property can be lawfully carried out unless the mortgaged property is valued not less than six months previous to the sale. In the premises she believes that the Respondents conduct is neither unlawful, honest or in good faith.

Unless the court restrains the Respondents the Applicant deposes that a fraud would be perpetrated against her. She appealed the suit property out of her own retirement benefits and as the businessman she runs on the premises is now the only source of livelihood she would suffer irreparably unless the court restrains the Respondents. He further deposes that the suit would be rendered nugatory, of no consequence if the injunction is not granted. Lastly that it is just and equitable that an injunction is granted as prayed for.

The affidavit in reply of the first Respondent is deposed to by the head of credit of the first Respondent Mr S. Ramachandran. He agrees that by sanction letter of 23rd of July 2013 the Applicant was granted to facilities as deposed in the affidavit in support of the application. Secondly by sanction letter of 30th of July 2014 the Applicant was granted to other 12 months facility of US\$630,000 and Uganda shillings 1,185,000,000/= respectively at an agreed rate of interest of 12% per annum for the dollar facility and 24% per annum on the shilling facility with the penal interest on both facilities of 36% per annum. As security for the two facilities the Applicant exhibited mortgages over the properties comprised in LRV 2744 Folio 25 Plot 47 Nabugabo road and LRV 2339 Folio 19 Plot 53 McKenzie Vale, Kololo, Kampala. The Applicant stood a risk of losing the securities in the event of default. The Applicant defaulted in servicing the facilities and according to the terms thereof she was served with a statutory notice. The Applicant failed to pay the sums demanded in the notice of default dated 16th of October 2014 annexure "D" and a notice of sale was issued in accordance with annexure "E". The notice of sale is dated 20<sup>th</sup> of January 2015.

By letter of 17<sup>th</sup> of February 2015 the Applicant acknowledged receipt of the notice of sale and informed the Respondent that she was in advanced stages of arranging alternative financing to settle the entire obligation to the first Respondent within 21 days and the Respondent accepted the request according to copies of correspondence. On 19<sup>th</sup> February 2015 the Applicant indicated that she was in negotiations with Messrs Orient bank Ltd by letter to the first Respondent and requested for 21 days to conclude. By a further letter of 11<sup>th</sup> of March 2015 the Applicant indicated that the settlement of the whole of the outstanding loan amount was imminent and requested for advice on the loan balance which the first Respondent bank gave but no payment was made. By a further letter of 11th of May 2015 the Applicant reiterated that she was in negotiations with Orient bank on the possibility of financing and requested for two more weeks to conclude the negotiations. Again the letter of 10<sup>th</sup> of August 2015 the Applicant notified the first Respondent bank that she had mobilised 70% of the outstanding loan sum and requested for release of plot 47 Nabugabo Road securities upon payment of that amount. However she made no payment. On 15<sup>th</sup> October 2015 the Applicant having failed to pay the amount indicated in the notice of sale compelled the first Respondent bank to advertise the mortgaged securities in the New Vision newspaper of that date. On 20<sup>th</sup> October 2015 the Applicant through her lawyers

wrote a letter inquiring as to whether the mortgaged security could be released upon partial payment of the loan being made and the bank by letter dated 30<sup>th</sup> of October 2015 reiterated its position that the mortgaged securities could only be released upon payment of the whole sum. By 19<sup>th</sup> of November 2015 the Applicant was indebted to the bank in the sum of US\$1,135,389.94 and Uganda shillings 2,626,871,564/= which sums continued to accrue interest at the contractual rate.

On 9<sup>th</sup> November 2015 the Applicant filed HCCS 743 of 2015 against the first Respondent alleging that the loan agreement and the mortgage deeds were null, void and unenforceable for being in contravention of the Illiteracy Protection Act because she never spoke English nor understood documents used in the transaction. The Applicant also filed an application for injunction miscellaneous application number 935 of 2015 to stop the bank from disposing of the mortgaged securities. She obtained an interim order in miscellaneous application number 936 of 2015 stopping the bank from disposing of the securities.

The court delivered a ruling on 21<sup>st</sup> December 2015 in the main application and granted a conditional temporary injunction restraining the sale of the mortgaged property upon the payment of Uganda shillings 4,000,000,000/= to the first Respondent by 14<sup>th</sup> of January 2016 and in default of which the injunction would lapse.

On 24<sup>th</sup> December 2015 the bank advertised the mortgaged security for sale in the New Vision Newspaper and fixed the date of sale as 20<sup>th</sup> of January 2016. The Applicant had not by 14<sup>th</sup> January 2016 paid the bank the amount of Uganda shillings 4,000,000,000/= and her attempt to avoid the sale of the mortgaged securities through it for the application to unconditionally get an injunction failed. On 20<sup>th</sup> January 2016 property comprised in plot 47 Nabugabo Road was sold to the second Respondent for a price of Uganda shillings 8,500,000,000/=. The second Respondent is that the registered proprietor of the property and possession was handed over to the second Respondent by the bank and the tenants thereon were notified of its proprietorship. The proceeds of the sale were applied in settlement of the Applicant's loan with the bank and for recovery expenses and the balance is available for the Applicant's use. On 20<sup>th</sup> October 2015 the property had been valued by Messieurs Bagaine and company valuation surveyors for market value of Uganda shillings 4,030,000,000/= and the forced sale value of Uganda shillings

2,820,000,000/= . It is not true that the Applicant notified the Respondent of an offer for US\$3,300,000 for the same property. Furthermore statutory requirements were complied with prior to the sale of the mortgaged property to the second Respondent.

In the premises Mr Ramachandran deposes that the Applicant's suit has no prospect of success and in the unlikely event that it is established that she would suffer loss, such loss can be atoned for by an award of damages. The first Respondent is a financial institution registered by the bank of Uganda with capital in excess of Uganda shillings 25,000,000,000/= and in the unlikely event that damages are awarded, in favour of the Applicant, it would be able to settle it.

A further affidavit of Nabukeera Christine, the managing director of the second Respondent was deposed on 23 February 2016 in reply to the Applicant's application. She deposes that the second Respondent is a bona fide purchaser and was registered on the suit property having lawfully purchased it from the first Respondent according to a copy of the certificate of title attached. Secondly after the advertisement of the property in the New Vision Newspaper of Thursday, December 24<sup>th</sup>, 2015 by the first Respondent, the second Respondent submitted a bid for the property of Uganda shillings 8,500,000,000/= and the bid was acknowledged by the first Respondent. Upon expiry of the notice on the 28 January 2016, the second Respondent was declared the highest bidder and its offer of Uganda shillings 8,500,000,000/= was accepted and a sale agreement was executed whereupon the second responded proceeded to make payments. Upon receipt of payment a duplicate certificate of title of the property and transfer form was released by the first Respondent to the second Respondent to transfer the title into its names. The second responded took immediate possession of the suit property upon payment of the full purchase price and all the tenants have recognised it as the landlord pursuant to a meeting held with the second Respondent's officers.

In the premises she deposes that the Applicant's application for an injunction has no merit whatsoever and the alleged bid of US\$3,300,000 by Mr Katongole Alex is unknown to the second Respondent since it has never appointed or authorised him to act on its behalf and the document cannot be used as a basis for denying the second Respondent its proprietary interest and quiet possession of the property. The property was purchased by way of a public auction upon the Applicant's failure to return the mortgage with the first Respondent.

She further deposes that the Applicant's application is based on a frivolous suit with no likelihood of success and has failed to demonstrate to court that she is likely to suffer irreparable damage in the event that the temporary injunction is not granted. On the basis of advice of her lawyers she deposes that the Applicant's application has no plausible grounds whatsoever to warrant the grant of a temporary injunction because she was given an opportunity to redeem the property before 14<sup>th</sup> January 2016 but failed to do so. Secondly the application is not tenable in law for lack of a prayer for a permanent injunction in the main suit.

In rejoinder by affidavit sworn to on 10<sup>th</sup> March 2016, the Applicant refutes the truthfulness of all averments in the affidavit in reply except where she expressly admitted them. At the time of making the affidavit the mortgaged property had been sold to the second Respondent in an illegal and purported sale that she contests. She is still in possession of the premises. She raises some issue with regard to the Illiterates Protection Act that I do not need to consider here.

She reiterated earlier facts and adds that on 10<sup>th</sup> August 2015 she requested to make a substantial payment of the credit facilities by paying the sum of Uganda shillings 3,650,000,000/= but the Respondent flatly refused. Due to the disagreement she filed HCCS number 723/2015 against the first Defendant and Fit Auctioneers and Court Bailiffs. With regard to the ruling of the court, the court did not lock her out from justice and the right to be heard concerning illegally carrying out the sale which is still under contest in HCCS 78/2016 and HCCS 743 of 2015 which are yet to be heard or determined. The court never sanctioned the first Respondent to carry out the sale illegally. She is in firm possession of the suit premises and the first Respondent has never handed over LRV 2744 folio 25 plot 47 Nabugabo Road to the second Respondent. At all material times including at the time of the hearing she is still living in the suit premises as the owner thereof. Secondly all tenants recognised her as the landlord and they have paid their rent according to copies of receipts. There is an application for a warrant to put the second Respondent in possession of the suit property which is still pending in this court. The notification of the Defendant's is wishful thinking. The Respondent's have not applied for or obtained an eviction order against her. The court has never pronounced itself on the continued quiet possession of the suit premises by the Applicant.

With regard to the notice of default issued by the first Respondent, the Applicant deposes that it was never served on her at all. In fact the mortgage deed omitted the named address of service. The notice did not relate to the suit property but to LRV 2339 folio 19 plot 53 McKenzie the Vale and it also fell short of the requirements of section 19 of the Mortgage Act, 2009. Secondly the alleged notices were never served on her as required by law and fell below the legal requirements in respect of notices for sale. On the basis of advice of Counsel the Applicant maintains that pursuant to the court rulings it was necessary for the first Respondent to issue fresh notices which it did not do.

Furthermore no valuation of the property was conducted with the participation or knowledge of the Applicant who was out of the country at the time of the alleged valuation report by Bageine and Company. At the time of the valuation the Applicant was out of the country according to the evidence of her passport.

In rejoinder to the affidavit of Christine Nabukeera the Applicant maintains that the second Respondent never paid a single cent in consideration because the consideration was provided by Christine Nabukeera from her own personal account without any supporting powers of attorney or company resolution permitting it. Only Uganda shillings 4,000,000,000/= was paid out of the bid amount. No public auction was as a matter of fact conducted and the whole transaction was between the first Respondent and the second Respondent. No valid sale without valuation from the sale that is in collusion between the Respondents without the requisite valuation reports.

Secondly, the second Respondent was not entitled to address an offer for the property to the first Respondent directly thereby sidestepping the auctioneers. Consequently there is no doubt that there was collusion between the Respondents. Furthermore the offer of US\$3,300,000 was made for and on behalf of Nabukeera Ltd which is allied to the second Respondent. There are triable issues in the suit and it is not frivolous or vexatious. On the basis of information of her lawyers no sale or mortgage property can proceed without valuation being carried out six months prior to the sale. In the premises, the actions of the Respondents are not lawful honest or done in good faith.

At the hearing of the application the Applicant was represented by Counsel John Musiime of Messieurs Kampala Associated Advocates. The first Respondent was represented by Counsel

Masembe Kanyerezi of Messieurs MMAKS Advocates. The second Respondent was represented by Counsel Innocent Tareemwa of Messieurs Tareemwa and Company Advocates.

The Applicant's Counsel relies on the facts and law. The application was commenced under Order 41 rules 1 and 9 and not under rule 2 which was cited in error. The principles relied on are set out in two cases namely Kiyimba Kaggwa vs. Nasser Katende [1985] HCB 53 which lays out the principles applied in the grant of a temporary injunction and the case of David Luyiga vs. Stanbic Bank HCMA 2002 of 2012.

On whether there is a prima facie case with a likelihood of success the Applicant's Counsel argued that the Applicant filed a suit which is not frivolous or vexatious and raises matters of fact and law fit for trial raised in paragraphs 8, 14, 15, 18, 22, 23 and 27 of affidavit in support and paragraphs 37, 37 and 40 of the affidavit in rejoinder. When considered together the following matters arise and merit judicial consideration.

Firstly, the issue is whether the property was advertised as required by law under section 28 (2) of the Mortgage Act. Section 28 (2) of the Mortgage Act provides that before exercising the power to sell the mortgaged land, the mortgagee shall serve a notice to sell in the prescribed form on the mortgagor and shall not proceed to complete any contract for the sale of the mortgaged land until twenty one working days have lapsed from the date of the service of the notice to sell. Secondly a sale is to be advertised in advance of an auction in such a manner and form as brings it to the attention of persons who are likely to be interested in bidding for the property. There has to be a coloured picture according to regulation 8 of Mortgage Regulations 2012. Regulation 8 prescribes that the mortgagee shall give notice of the public auction by advertising the intended sale in a newspaper of wide circulation. Thirdly, the advertisement shall include a coloured picture of the mortgaged property and specify: the time and place of sale and the time at which the property may be viewed by the public. A sale shall not take place before the expiration of twenty one working days from the date of service of the notice. Finally a person who contravenes regulation 8 cited above commits an offence. The advertisement in issue has less than a quarter of the space on the page. The quality of the picture was at best blurry. The value of the property is over 12 billion. This is a serious question of fact and law. It was also advertised

on 24<sup>th</sup> of December on Christmas eve. Furthermore the Applicant denied receipt of the statutory notice. This is a triable issue and is a matter of law which the court ought to investigate.

The Applicant says that the second Respondent Namaganda Ltd has not paid a single shilling for the property. With regard to regulation 15 of Mortgage regulations, it is only after payment of the full purchase price that the mortgagee shall execute transfer instruments. The Respondent has not no evidence of payment of a single shilling. The Respondent referred to an EFT payment record annexed to the affidavit of Nabukeera as evidence of payment. The attachment is in paragraph 4 and it stipulates that upon expiry of notice the second Respondent was declared the highest bidder. The paying customer is Christine Nabukeera and the receiving account is Crane Bank Ltd. The payment is for only 4,000,000,000/=. There is no resolution allowing for payment by an individual. Payment is not Uganda shillings 8.5 billion and the court ought to inquire as to whether money was paid by whom and to whom.

Furthermore the mode of payment referred to in the advertisement was by RTGS in favour of MMAKS Advocates and the Court should investigate this as well and particularly was there any payment? The offer made by the second Respondent dated 18<sup>th</sup> of January 2016 is not addressed to Feat Auctioneers but to Crane Bank. The Applicant's Counsel further submitted that there were five details to note. The sale was to be by auction but the offer is not in the auction. In such as a case the interests of the mortgagee and mortgagor are inherently in conflict and the law requires mortgagee to maintain a healthy distance. The Respondent over indulged in the sale of the property. This is because the offer was made way before the auction and was addressed to Crane Bank and does not answer details of the advert. It reads in part that "we still act for Namaganda" and demonstrates that there were previous dealings or correspondence on the matter. In the premises there was no arms length dealing and the second Respondent was reiterating bids. The Applicant's Counsel further submitted that they were not waiting for the auction but for the first Respondent. In attachment "D" which is a letter dated 28<sup>th</sup> Jan 2016 and unreferenced, there is no reference to the auction and any other bids. The Applicants Counsel contends there are serious questions as to whether there was auction. Was the second Respondent the highest bidder? These questions merit consideration by court. Further the Applicants Counsel submitted with reference to section 27 of the Mortgage Act that the Mortgagee owes a duty of care to the mortgagor and any surety to take all reasonable steps to obtain the best price.

The assertion of the Applicant that there was an offer of 3.3 million United States dollars equivalent to Uganda shillings 11,383,000,000/= merits judicial inquiry and consideration. The right of the mortgagee to sell is contested. Even if the first Respondent was right to sell, they had a right to sell it lawfully.

On the second ground, the Applicant's Counsel submitted that injunctions would not be granted unless Applicant would suffer irreparable injury. He relies on the case of David Luyiga vs. Stanbic Bank HCMA No. 202 of 2012. He submitted that the Applicants contention is that there is evidence that she will suffer irreparable damage unless the injunction is granted. The requirements in ground 1 are requirements of law and regulations. Those regulations have a mandatory procedure and lay down the minimum conduct to ensure that the sale of the mortgaged property is transparent. It protects the property. For emphasis Counsel contended that the property must be paid for in full and the law protects the mortgagor. He submitted that there rights of the mortgagor should be protected and not taken away but asserts that the mortgagor can be compensated. He further submitted that the mortgagee did not follow mandatory provisions of the law and cannot purport to buy out the Mortgage Act (i.e. through an award of damages). He submitted that their remedy was an annulment of the transaction otherwise the courts will open its doors to all kinds of problems.

The Applicant's Counsel further submitted that the Applicant resides in the property which she built out of her own resources.

Furthermore the Applicant's Counsel submitted that the courts will not normally be grant an application for injunction unless the Applicant would otherwise suffer irreparable injury that cannot be atoned for by an award of damages. The wording of the principle shows that there are exceptions to this rule and the court ought to find that the Applicant's application discloses such an exception.

The Applicant's Counsel further maintains that the allegations of the Applicant disclose fraud, collusion, illegality and outright jettisoning of the law. If the court does not halt the process there would be a great absurdity and the court process will be lent to the fraud. The court would have missed an opportunity to deal with the fraud. The court should err on the part of caution and inquire into the matter. He submitted that the house is still there and the interest of the

Respondent is money according to the affidavit in reply. The first Respondent contended that the proceeds of the sale were available to the Applicant. However the Applicant does not respect the sale. The second Respondent's problem is that of collecting rent. There has been no delay and the sale occurred on 28<sup>th</sup> of Jan and on 29<sup>th</sup> Jan court when this court issued a ruling. In MA 77 of 2016 it was contended that the sale was a court supervised sale. Did the court lend its process to the sale? Application 145 which is on record is concerned with an eviction based on a negative order and is an anomalous situation.

In the premises the Applicants Counsel contends that the Applicant has demonstrated that she will suffer irreparable damages that cannot be atoned for by an award of damages. Lastly the Applicants Counsel submitted that if the court is in doubt it will consider the application on a balance of convenience. The balance of convenience lies in granting the application rather than in refusing it. The Applicant resides in the property. The Respondents are interested in recovering money and they will not lose. Thirdly the first Respondent has other titles of the Applicant in their possession as security. The interest of the second Respondent is in rent according to paragraph 6 of the affidavit of Christine Nabukeera. The First Respondent would compensate them. Furthermore, if the Applicant succeeds, fraud and illegality would have been committed against her. The certificate of title has been transferred and she stands to lose more than the Respondent. In the premises Counsel prayed that there should be a stay of the transaction in the certificate and all further transfers of title on the suit property should be prevented.

In reply Counsel Masembe Kanyerezi, Counsel for the first Respondent opposed the application. He submitted that the application has no merit and must fail. For the law on injunctions he relied on Pan African Commodities and Aya Biscuits (U) Ltd vs. Barclays Bank PLC HCMA No. 0385 of 2007 (Arising from HCT – 00 – CC – CS – 0528 – 2—7) and holding in paragraphs 10, 18 and 19. An Applicant for a temporary injunction must first show that it has a prima facie case. Secondly, that it stands to suffer irreparable loss should the injunction not be granted, In case of any doubt the court will decide the suit on the balance of convenience. Where damages in the measure recoverable at common law would be an adequate remedy and the Respondent would be in a position to pay them, no interlocutory injunction would normally be granted. In that case the court found that the Applicants had not shown that if the injunction was not granted and should

they succeed at the trial, the loss they would suffer was incapable of monetary compensation. They did not show that the Respondent was incapable of paying the compensation if they succeed in the main suit.

Furthermore in *Kakooza Abdullah vs. Stanbic Bank HCMA No. 614 of 2012*, it was held that generally loss of property pledged as security through sale cannot lead to irreparable loss because such loss through sale contemplated by the parties cannot lead to irreparable damage. Once pledged as security the argument cannot be made. There may be a limited argument about the value of property. a combination of authorities leads to the conclusion that as crane bank says they would be in position to pay damages. The property was pledged and on that basis the injunction should be refused.

The first Respondents Counsel submitted that the Applicant's Counsel seemed to handle the issue on the basis of the value of the property. However, the borrower had a Uganda shillings 12 billion loan and neither in the pleadings or application is there a contest on the quantum of debt. The contest is on procedural steps taken such as the notice of sale. On this ground alone the injunction ought to be refused. It also takes care of the point raised in paragraph 23 of the affidavit of the Applicant who says she received an offer of 3.3 million United States dollars. It is a case of sale at undervalue and therefore a monetary claim. That being so it is not a basis for granting an injunction.

On whether there is a prima facie case with a prospect of success the firstly Respondents Counsel submitted that the claim is based on two grounds. Firstly the ground is that the Applicant did not receive the requisite statutory notices such as the notice of default and notice of sale. Notice of default is under section 19 of the Mortgage Act 2009 while a notice of sale is issued and served under section 26 (2) of the Mortgage Act. Secondly it was submitted for the Applicant that the advertisement for sale of the property was defective under section 28 (2) of the Mortgage Act and regulation 8 (2) of the Mortgage Regulations 2012. The case would stand or fall on the issue of whether there was a property valuation prior to sale. The first Respondents Counsel submitted that with reference to section 29 of the Mortgage Act, the court had granted an earlier injunction and now the suit is a new suit on the basis of the alleged ineffective sale. The Applicant conceded that the property is registered in the names of Namaganda Ltd and the person who

seeks possession is the proprietor. Section 29 (2) (c) closes the problem of notice which provides that a purchaser in a sale effected by a mortgagee acquires good title except in case of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which the purchaser has actual or constructive notice. And in (c) is not affected by the default of the mortgagor or by a question as to whether due notice had been issued prior to the sale or whether the sale is otherwise necessary or proper. In the premises the first Respondents Counsel maintained that the application for injunction against eviction must fail and the trial should continue.

Furthermore as a matter of fact the first Respondent's Counsel relies on the affidavit of Mr. Ramachandran and annexure F thereof in which the Applicant acknowledges receipt of the notice of sale. A prima facie case in relation to what is sought to be restrained is not made out.

On whether payment was made, the first Respondent's Counsel contended that the arguments show that the Applicant was clutching at straws. It does not matter whose money is paid what matters is whether there was a debt and whether the liability has been extinguished. The first Respondent accepted the payment and it extinguished the loan leaving a balance for the Applicant to collect and therefore the whole question cannot arise. The property was sold in Nabugabo and the proceeds were applied in settlement of the debts. The accepted liability was extinguished and therefore there was payment.

With regard to whether there was an auction, it was that there are letters between the first Respondent and second Respondent Messrs Namaganda Ltd. The first Respondent's Counsel submitted that firstly the advertisement gave notice that the sale will be by public auction/private treaty. Annexure E has a sale agreement between Crane Bank and Her company and clearly provides that there was a sale by private treaty. Sale by private treaty is saved by regulation 10 of the Mortgage Regulations. Offers are taken to the bank in the context of the auction format and if the highest bid amount is above the forced sale value, a sale agreement may be approved. The bank invites bids and there was a sale by private treaty. There is no prima facie case of success.

On the point that money should be paid to MMAKS Advocates the first Respondent's Counsel submitted that the answer is the money would end up with Crane Bank anyway.

The Applicant submitted that all the Respondents wanted is money but what is important is the proprietary right and the purchaser is entitled to enjoy the right. Provided there is no basis for injunction to restrain the registered proprietor there is no remedy of injunction. The Applicant is deriving rental income and resides there. That cannot be ignored and taken lightly. She cannot remain collecting rentals and enjoying rental income where there is no illegality.

As to whether there is an illegality, the Respondents Counsel submitted that there was no breach of law and not one of the points of the Applicant involves breach of law. In the affidavit in rejoinder of the Applicant, she deposes that she receives rentals and she wants to be protected. She wants to continue running the business.

The first Respondent's Counsel submitted that the balance of convenience clearly lies with the purchaser who is registered and had extinguished liability of the Applicant. She should take possession and collect rent. If anything was done wrong it should be visited on the first Respondent bank. For those reasons injunction should be refused with costs.

In further reply, Counsel Innocent Tareemwa associated himself with the submissions of the first Applicants Counsel and added that the second Respondent opposes the application on grounds that she lawfully purchased the property from the first Respondent at a sum of 8.5 billion Uganda shillings and receipt was acknowledged by the first Respondent. On the allegation that no consideration was ever paid, the first Respondent in her affidavit in reply through Ramachandran deposed that the money was received and part of the evidence is the annexure E referred to by the Applicant's Counsel. The second Respondent attached a sale agreement between the two parties. There is proof of money remittances from Nabukeera from her DFCU account. She is the Managing Director of the second Respondent. The purchase of property was as a result of an advertisement annexure B to the affidavit in reply together with a letter dated 18<sup>th</sup> Jan 2016 addressed to Head of Credit Crane Bank. In the first paragraph it is written that we still act for.... it was a second correspondence in term of bid. Following intervention of court when she was granted 4 billion to deposit in court the first advert lapsed and upon re-advertisement on 24<sup>th</sup> of Dec 2015 the second Respondent had to re-apply. It is not in contention that she is registered and she is entitled to quiet possession of the property. She is protected by section 29 (2) (c) of the Mortgage Act and is not obliged whether there is a default or whether requisite notice was given.

We submit that she is entitled to quiet possession. He further submitted that the possession of the Applicant is a result of the intervention of this court otherwise all tenants were introduced to the first Respondent. The tenants declined to remit rent because of the order of this court in the interim. The Applicant failed to prove that the grounds required for grant of an injunction has been made out. The second Respondent's Counsel submitted that the application is vexatious. With particular reference to the contention of the Applicant that she had an offer of 3.3 million US\$ from a company allied to the second Respondent no evidence was attached to prove that such an offer was ever made. In the premises the Applicant has no chance of success in the main suit. The issue in dispute is discrepancy in figures as to whether the consideration is for the property. The offer of the Respondent was accepted and title transferred to her. Further there can be no prima facie case and irreparable damage where the Applicant borrowed money and failed to pay back even after intervention of this court. She was not why she was unable to comply with the court ruling giving her time to deposit a percentage of the outstanding amount. Furthermore the second Respondent's Counsel submitted that the Applicant did not pray for a permanent injunction in the main suit and that rendered renders this application a nullity. He relied on **Seroma Ltd vs. Elim Company Ltd HCMA NO. 214 of 2015** for the holding that an application for injunction should not be allowed where there is no prayer for a permanent injunction in the main suit. In the premises the second Respondents Counsel prayed that the Applicants application is dismissed with costs.

Finally Counsel John Musiime, Counsel for the Applicant submitted in rejoinder to the first Respondent's submission. On the notion that the case deals with procedural lapses, it is clear that the Applicant had no choice but to file a suit for a permanent injunction and relief from sale of property. She challenges the sale on the ground that the second Respondent not a registered bona fide purchaser for value. She did not pay and only paid Uganda shillings 4,000,000,000/=. He further submitted that there was unbridled fraud because no public auction took place. While the first Respondent admitted that there was no public auction the second Respondent deposed that there was a public auction.

The Applicant's Counsel submitted that there is a suit as to whether there was consideration, collusion but the Respondent's Counsel sought to trivialise it. Court should distinguish the facts. The circumstances of this case are different. The cases referred to dealt with seeking to stop a

sale. The second point is that no sale had taken place. Without prejudice even if the Respondent had an unqualified right to sell the property it should be done lawfully. The sale of mortgaged property is regulated even if the mortgagor did not pay a single cent in servicing the loan. The total sum of facts is that there was collusion and it merits courts consideration. There was a sale by private treaty and there is a difference between the Respondents on the issue. The question is whether the sale was by private treaty or public auction.

Furthermore failure to take the requisite procedural steps is in the heart of integrity of the process. The Public will have confidence because there is no abuse of the process. The so called procedural lapses are mandatory. Regarding the ability of Messrs Crane Bank to pay, the Applicant's suit is not for damages only but for cancellation of title. The contest for possession is between the Applicant and Namaganda and not the first Respondent and there is no evidence that she paid Uganda shillings 8.5 billion. As far as admission to payment of the first Respondent is concerned a party accused of fraud cannot be the last voice on whether the entire consideration was paid (and the matter is in issue). In any case evidence ought to be adduced on the issue. As far as the protection of section 29 (2) of Mortgage Act is concerned, it does not cover a purchaser who buys fraudulently or illegally and Illegality overrides her interest. As for sale by private treaty, it required prior written consent of the mortgagor. Issues about rental should be disregarded because the Applicant alleges fraud.

In rejoinder to the second Respondents Counsel, the Applicant's Counsel submitted that there is no evidence of payment of 8.5 billion. The Applicants complaint is that the sale can only be made legally and is not about her liability to the bank. Her indebtedness to the bank is contested in another suit. Furthermore the property was re-advertised and there had to be a public auction.

Finally the Applicants Counsel sought to distinguish the case of Seroma Ltd vs. Erimu Company Ltd and KCB Bank 9U) Ltd HCMA 214 of 2015. He submitted that those authorities dealt with Order 41 rule 2 and there is a marked difference between Order 41 rule 1 and Order 41 rule 2 of the Civil Procedure Rules. In rule 2 there is a requirement for a prayer for a permanent injunction before the grant of an interim injunction.

## **Ruling**

I have carefully considered the application together with the affidavits filed for and against the application by the Respondents and the affidavit in rejoinder. I have further taken into account the oral submissions of Counsel which have been reproduced above together with the authorities which were photocopied and forwarded to this court.

There is no controversy about the principles used by the court in considering an application for a temporary injunction. The issue is really one of whether the Applicant has satisfied the court following the principles. For that reason an outline of the principles is necessary to deal with each subheading.

The purpose of an injunction is to maintain the status quo until the question to be investigated in the suit is finally determined. To exercise this equitable remedy the principles are that the Applicant must show a prima facie case with a probability of success. This is sometimes phrased differently following the decision of Lord Diplock in **American Cyanamid Co. Ltd v Ethicon [1975] 1 ALL E.R. 504** at pages 510 and to the effect that the Applicant should show that the suit discloses serious questions to be tried and that the action is not frivolous or vexatious.

Where serious questions for trial are disclosed the Applicant must show that if an injunction is not granted he or she would otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages.

Where the court is in doubt on the first two principles it will decide the application on the balance of convenience. These principles are common law principles. The foundation for an application for a temporary injunction is however statutory and rule based. Under section 37 of the Judicature Act Cap 13 laws of Uganda, the High Court may grant an order of mandamus or injunction by an interlocutory order in all cases in which it appears to the High Court to be just and convenient to do so. This is a wide jurisdiction and a section in *pari materia* was considered in the case of **Montgomery vs. Montgomery [1964] ALL E.R. 22**. The section is the Supreme Court Judicature (Consolidation) Act, 1923, s. 45 (1) quoted in the decision which provides that:

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

This provision is reproduced by section 37 of the Uganda Judicature Act, Ormrod J held that injunctions can be granted solely to protect a legal right and further laws out the principles for injunctions to protect a legal right at page 23 and 24 respectively. The Hon judge granted an injunction for the benefit of the wife to restrain her husband from molesting her and having access to her flat. All she had to prove was a threat by the husband to do what he was restrained for and this jurisdiction is exercised to protect a legal right. This is what Ormrod J held:

“Notwithstanding the extremely wide terms of this sub-section, it is, I think, a fundamental rule that the court will grant an injunction only to support a legal right.”

Secondly the common law rules cannot override express statutory provisions because those take precedence over common law under section 14 of the Judicature Act. The law that overrides other laws is the Constitution followed by Acts of Parliament and finally followed by subsidiary legislation. Then in so far as the written law does not extend or apply then the court has jurisdiction to apply common law. In other words common law does not apply where the written law or statutory law applies. For that reason the common law principles for the grant of a temporary injunction should not be applied where there are express statutory provisions which guide the court on what to do.

The Applicants application invokes Order 41 rules 1 of the Civil Procedure Rules and rule 1 (a) thereof which provides that where it is proved by affidavit or otherwise that “*any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or...*” the court may grant an injunction to maintain the status quo. The Applicant’s property was sold and this is an application pursuant to a suit challenging the sale of the mortgaged property and not to proven the sale. It in effect seeks restraint in further dealing in the property and change of possessory right notwithstanding the sale of the land.

Prima facie case

In considering this ground, it is sufficient for the Applicant to show that there is a serious question or serious questions of fact or law which merit judicial consideration and that the suit is not frivolous or vexatious.

I will start with the submission of the second Respondent's Counsel that the Applicant's application for a temporary injunction cannot be granted because the Applicant did not pray for a permanent injunction. The second Respondents Counsel relied on the case of **Seroma Ltd vs. Erimu Ltd and KCB Bank (U) Ltd HCMA No. 214 of 2015 (arising from Miscellaneous Application Number 1178 of 2014) (also arising from Civil Suit Number 577 of 2014)** before Honourable Lady Justice Monica Mugenyi. She held that it is trite law that an application for an interlocutory injunction should not be allowed where no prayer for a permanent injunction has been sought in the substantive suit. That application had been brought under Order 41 rule 4 of the Civil Procedure Rules to set aside an order issued by the Assistant Registrar. The Applicant's Counsel submitted that the authorities relied upon dealt with Order 41 rule 2 of the Civil Procedure Rules. The wording of Order 41 rule 2 (1) of the Civil Procedure Rules clearly envisages a suit for a permanent injunction because it provides that:

"(1) In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the Defendant from committing a breach of contract or injury complained of, or any injury of a kind arising out of the same contract or relating to the same property or right."

In the case of the **Kihara versus Barclays Bank (K) Ltd [2001] 2 EA 422** the High Court of Kenya considered whether an interlocutory injunctive relief could issue when a permanent injunctive relief has not been sought in the main suit. Ringera J of the Kenyan High Court held that it depends on what is sought in the main suit. Where in the main suit the Applicant had sought an injunctive relief, then the application for an interim relief can be granted. The ruling depended on the wording of Order 41 rule 2 (1) (the equivalent Ugandan rule quoted above). In Uganda the same situation was considered in **Frank Nkuyahanga vs. Esso (U) Ltd HCCS 377 of 1992** where Hon. Justice F.M.S Egonda – Ntende considered the same rule and came to the same conclusion.

I agree with the Applicant's Counsel that the Applicant's application proceeded from Order 41 rule 1 of the Civil Procedure Rules and the cases cited by the second Respondent's Counsel on

that point are distinguishable. For that reason an application for a temporary injunction will be considered on the traditional grounds quoted above provided express statutory provisions do not apply thereto or extend.

Furthermore the second issue which relates to a point of law concerns the wording of section 29 (1) of the Mortgage Act 2009. It is to the effect that a purchaser in a sale conducted by a mortgagee acquires good title except in the case of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which the purchaser has actual or constructive notice. The second Respondent is a purchaser from the first Respondent who is the mortgagee. The Applicant seeks to impeach her title to the mortgaged property which was sold by the first Respondent to the second Respondent. Secondly it was submitted for the Respondents that section 29 (2) (c) of the Mortgage Act 2009 provides that a purchaser is not obliged to enquire whether there has been default by the mortgagor whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

The above points amount to a submission that a temporary injunction cannot be granted because the title passed on to the second Respondent pursuant to sale of the mortgaged property by the first Respondent.

The Applicant imputes fraud and collusion on the part of both Respondents and I will consider the matter on the merits but not as barred by law.

The first ground on whether there is an arguable case arises from the evidence adduced in support of whether there was a sale by public auction or private treaty. While the first Respondents Counsel submitted that there was a sale by private treaty, the affidavit of the first Respondent through Mr Ramachandran the head of credit thereof and particularly paragraph 21 Annexure "T(i)" in a letter dated 28<sup>th</sup> of January 2016 shows that the property was auctioned to the second Respondent as the highest bidder at Uganda shillings 8,500,000,000/=. He also attached annexure "T (ii)" which is the sale agreement dated 28<sup>th</sup> of January 2016 in which the second Respondent bought the property from the first Respondent in a private treaty.

The Applicant had challenged the process of the alleged auction on several grounds. With regard to whether it was a private treaty or public auction, the first Respondent's Counsel had submitted

that there was a private treaty. The first Respondent's Counsel submitted that it was a sale by private treaty according to the sale agreement dated 28<sup>th</sup> of January 2016. The submission is generated by the agreement itself. This agreement is annexure "E" to the affidavit of Christine Nabukeera the Managing Director of the second Respondent. In the recital F of the agreement it is provided that:

"The Mortgagee is pursuant to the powers vested in it under the mortgage deed and the Mortgage Act desirous of realising the security by disposing it off and have the proceeds applied towards settlement of the monies owed to it by the Registered Proprietor, and the Purchaser is desirous of purchasing the property on the terms and conditions set out below:"

According to the Oxford Dictionary of Law, Fifth Edition, an auction is a method of sale:

"A method of sale in which parties are invited to make competing offers (bids) to purchase an item. The auctioneer, who acts as the agent of the seller until fall of the hammer, announces completion of the sale in favour of the highest bidder by striking his desk with a hammer (or in any other customary manner). Until then any bidder may retract his bid and the auctioneer may withdraw the goods. The seller may not bid unless the sale is stated to be subject to the seller's right to bid. Merely to advertise an auction does not bind the auctioneer to hold one. However, if he advertises an auction without reserve and accepts bids, he will be liable if he fails to knock the item down to the highest outside bidder. An auctioneer who discloses his agency promises to a buyer that he has authority to sell and that he knows of no defect to the seller's title; he does not promise that the buyer of a specific chattel will get a good title."

As far as the auction is concerned, the contract is made on the falling of the hammer and not by private treaty or a written agreement. According to Halsbury's laws of England fourth edition reissue volume 2 and paragraph 901 and 'Auction' and 'auctioneer' is:

"An auction is a manner of selling or letting property by bids, usually to the highest bidder by public competition. The prices which the public are asked to pay are the highest which those who bid can be tempted to offer by the skill and tact of the auctioneer under the excitement of open competition. Although the word 'auction' is derived from the Latin

*auctio*, an increase, a 'Dutch auction' is one where the property is offered at a certain price and then successively at lower prices until one is accepted."

The distinction that comes out in the above definition is that between a private contract and a public auction. The two are not the same thing. A contract in an auction is made when a bid is accepted by the falling of the hammer. The offer is made and the bidder gives a price. The price is determined when the hammer falls and is binding on the auctioneer. On the other hand a private treaty means that the contract is made in writing giving the terms and price of the goods or property.

In the affidavit in reply paragraph 4 thereof of Nabukeera Christine, the deponent testified that the second Respondent bought the property upon expiry of notice on 28<sup>th</sup> January 2016 after being declared the highest bidder. There is therefore an issue of whether there was a public auction or sale by private treaty because the bidder also attached a contract which purports to be the terms of the agreement of sale. The above is by itself a prima facie case or a triable issue which merits judicial consideration. It is not resolved by the submission that the advertisement catered for both public auction and private treaty. The requirements for conducting a sale by private treaty are not the same as the requirements for conducting a public auction. Where there is a sale by private treaty it is a requirement for there to be written notice of the mortgagor consenting to sale by private treaty. In other words section 28 (1) (d) of the Mortgage Act 2009 provides that the sale of the mortgaged land shall be by public auction unless the mortgagor consents to a sale by private treaty. The form of the consent of the mortgagor has been provided for but there could not have been any notice of consent in the circumstances of this case because presumably the issue of the sale of the property is the subject matter of two suits which are still pending and the sale is contentious. Had the mortgagor consented to sale by private treaty, there would have been no suit in the courts or the notice should be sufficient to resolve the issue. The question remains whether the sale had to be by public auction in the facts and circumstances of this suit.

There are other issues which have been raised such as whether the requisite statutory notice had been issued. It is my holding that the Applicant can only challenge the mode or procedure of sale having failed to stop the sale pursuant to a temporary injunction granted by this court on 21<sup>st</sup>

December 2015 in HCMA 935 of 2015 arising from HCCS 743 of 2015. The question of whether there was a notice to the mortgagor ought to have been considered in that application. However the affidavit of Mr Ramachandran attaches a letter of 17<sup>th</sup> of February 2015 in which the Applicant acknowledges notice of sale of property by the Applicant in her own letter.

The Applicant also raises questions as to whether the property was properly advertised under the relevant statutory provisions. Notice to the public in this case was issued on 24<sup>th</sup> December 2015. The Applicant's grievance is whether the advertisement was carried out as required by law under section 28 (2) of the Mortgage Act by service of the notice to sell in the prescribed form. I must first note that there are previous proceedings between the parties in which the Applicant applied for a temporary injunction to stop the sale of the suit property and an injunction was granted. The Applicant obtained a conditional injunction which lapsed on 14<sup>th</sup> January 2016 for non-payment of Uganda shillings 4,000,000,000/=. The Applicant had undertaken to deposit that amount by 14<sup>th</sup> January 2016 and did not do so. That being so, the property could be re-advertised for sale, and the application for injunction is related to impeachment of sale on the merits and the suit is about whether the sale was proper and not whether the property should be sold.

The only relevant provision regarding notice of sale in the prescribed form can arise from regulation 13 (7) of the Mortgage Regulations 2012 which provides that where a sale is adjourned under regulation 13 for a period longer than 14 days, a fresh public notice shall be given in accordance with regulation 8. The fresh public notice is given in accordance with regulation 8. Regulation 8 as far as advertisement is concerned prescribes what an advertisement is supposed to be. Regulation 13 only import the provisions relating to a fresh public notice and not notice to the mortgagor as required by section 26 of the Mortgage Act and not whether there was notice of sale to the mortgagor. In the premises, as far as the fresh public notice is concerned, the provisions dealing with notice to mortgagor are not applicable.

Secondly the Applicant submits on the basis of section 28 (2) of the Mortgage Act and regulation 8 about the contents of the notice. While he repeats that the advertisement has to be preceded by a notice to the mortgagor and other persons required to be notified of the sale, he however included the contents of the notice under regulation 8. I have carefully considered the contention in light of the provisions of section 29 (2) (c) of the Mortgage Act 2009, and I am satisfied that

the Applicant can only obtain an injunction as against the registered proprietor who is the second Respondent and the second Respondent is not obliged to enquire whether there was a default in the issuance of the notice and that contention is frivolous and cannot be sustained. I must emphasise that the members of the public are not obliged to enquire why the property was advertised and the appropriateness of the advertisement. The advertisement is supposed to give notice and having received notice, there would be no prejudice to a purchaser who participates in a public auction.

I have further considered the contention that the sale of the property is to be preceded by a valuation report at a maximum of six months previous to the sale. This contention raises triable issue between the Applicant and the first Respondent and cannot be handled in a temporary injunction application. Regulation 11 of the Mortgage Regulations 2012 provides that the mortgagee shall value the property before selling it and the valuation report shall not exceed a period of six months before the date of sale. The provision for valuation of property is mandatory.

The Applicant raises the issue of whether payment had been made prior to the transfer of the property. The issue is contentious though the first Respondent admits that he received the money and is willing to pay the balance after offsetting the debt amounts. The submission of the first Respondent suggests that no prejudice has been occasioned to the Applicant if the Respondent is willing to account for the entire purchase price. However the issue is a question of law based on the provisions of regulation 15 of the Mortgage Regulations. First of all the sale transaction whether by private treaty or public auction took place on 28<sup>th</sup> January 2016. It is provided that the property shall be transferred after the payment of the full purchase price. So there are questions of fact raised in the pleadings and submissions as to whether the full purchase price was paid before transfer of the property purportedly on 1<sup>st</sup> of February 2016. The evidence for the contention is in the affidavit in reply of the managing director of the second Respondent Christine Nabukeera in which there is a settlement of an amount of Uganda shillings 4,000,000,000/= . While the purchaser is only required to pay 30% of the purchase price after the falling of the hammer in terms of regulation 14 (1) of the Mortgage Regulations 2012, and the balance could be paid within 21 days, the property was transferred within a few days and there is no evidence attached showing that this was done before the full purchase price had been paid. I

have duly considered the question that the first Respondent acknowledges that the indebtedness of the Applicant had been settled. No specific details were given.

In the premises, there are serious questions of law and fact to be investigated as far as sale sought to be impeached is concerned.

On the second question of whether the Respondent would otherwise suffer irreparable injury which cannot be atoned for by an award of damages, the Respondent's Counsel demonstrated that there are questions about the amount of money to be paid especially with reference to the allegation that the first Respondent had actually received an offer of US\$3,300,000 which is equivalent to Uganda shillings 11,383,000,000/= which is much higher. While this raises a question of prejudice I agree that ordinarily the Applicant can be compensated by an award of damages. The Applicant's Counsel on the other hand submitted that the question of illegalities cannot be wished away by an award of damages and the court would be endorsing breach of statutory provisions. The Applicant raises other sentimental issues such as the property having been acquired from her savings. The weight of authorities is that a mortgagor cannot plead the pain or sentimental value of property owing to loss of property by sale of the mortgaged property. This is in on the premises that loss of property by sale is contemplated by the parties in the execution of a mortgage and acts of default pursuant to which the property may be sold are agreed to. However, the sale has to be lawful. For instance sale by auction makes a deal by competitive public bidding and the deal is made at the fall of the hammer. A private treaty sale is negotiated. The applicant has a right to object to a private treaty sale by not consenting to it. The court has to interpret the law as to whether a notice of consent as prescribed is necessary even if the mortgage agreement give the mortgagee a right to sell by private treaty in the event of default. Loss though illegal dealing cannot be contemplated and therefore I am in doubt on whether the Applicant would otherwise suffer irreparable injury which cannot be atoned for by an award of damages if her rights are violated through a breach of statutory provisions.

I will therefore consider the application on the basis of the balance of convenience. The Applicant's suit tries to impeach the title of the second Respondent which was obtained immediately after 28<sup>th</sup> January 2016. I have duly considered the provisions of section 29 (4) of

the Mortgage Act which provides that the purchaser is entitled to remedies against the mortgagee. It provides that:

"A purchaser prejudiced by the unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the mortgagee exercising that power."

Having considered that the allegations of the Applicant go beyond accusing the first Respondent's officials and extends to an allegation of collusion by the second Respondent who is the purchaser of the property, where then would the balance of convenience lie? If the title of the second Respondent is impeached, the second Respondent is entitled to compensation. A further consideration of section 29 (1) of the Mortgage Act provides that the purchaser in a sale effected by the mortgagee acquires good title except in the case of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which the purchaser has actual or constructive notice. In other words where the suit is for the impeachment of title of the purchaser on the ground of fraud, the matter is a triable issue and the purchaser does not enjoy protection. In other words the property can still be salvaged and further dealings in it stopped before the matter gets out of hand. The allegations and correspondence demonstrate that the purchaser purported to purchase through public auction and there are letters to this effect yet there is a private treaty sale. Was there any collusion or was this an innocent anomaly? Moreover the purchaser is not to be prejudiced by unauthorised, improper or irregular exercise of the power of sale and is entitled to damages as against the mortgagee. How would the question of alleged failure to carry out a valuation contrary to the statutory provisions affect the sale? I have further considered regulation 16 of the Mortgage Regulations 2012 which provides that irregularity in conducting the sale by public auction shall not vitiate the sale. In this particular case the issue is whether the sale was by public auction or by private treaty and the question of whether the sale was irregularly conducted is only additional and related to the appropriateness of the notice issued to the public. Finally the High Court still retains jurisdiction to grant an interlocutory injunction in appropriate cases under section 37 of the Judicature Act. In the case of **Margaret, Duchess of Argyll (feme Sole) v Duke of Argyll and others.**[1965] 1 ALL E.R. It was held that the jurisdiction is exercised to protect a legal right. Secondly the jurisdiction had always been exercised to prevent what the court considered or treated as a wrong, whether arising from the violation of unquestionable right or breach of contract or confidence. This does not have to flow from Order 41 rule 2 of the Civil

Procedure Rules only but may proceed from the wider Jurisdiction of the Court under section 37 of the Judicature Act. Statutory provisions should as far as possible be enforced. I agree with the Applicants counsel that the award of damages per se is not adequate and should not enable the statute to be “bought off”.

The Applicant is in possession of the suit property and has been collecting rent thereof. In the premises the balance of convenience lies in granting the temporary injunction on one condition that all the rent in the property shall be deposited in this court with effect from the date of this order. In the premises, the following orders issue:

1. A temporary injunction issues restraining the Respondents, their agents and (or) servants from evicting the Applicant or in any way dealing in the suit property comprised in LRV 2744 Folio 25 Nabugabo Road, Kampala pending final determination of the main suit.
2. The Applicant shall account for all the rent received from the property so far and file an account in this court.
3. All tenants on the suit property shall deposit rent in this court or in the alternative all rent that is collected from the suit premises shall be deposited in this court with effect from the date of this order pending determination of the suit.
4. The costs of this application shall abide the outcome of the main suit.

Ruling delivered in open court on the 26<sup>th</sup> of August 2016

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Counsel Innocent Tareemwa for the second Respondent

Counsel Earnest Sembatya for the first Respondent

Counsel Musiime John for the Applicant

Applicant is in court

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**26<sup>th</sup> of August 2016**