

The grounds of the application are set out in the affidavit deposited by Musiige Richard and briefly are that the respondent breached a contract they had by failure to extend an agreed loan facility of US Dollars 40,000, the respondent is breaching the loan offer by proceeding to sell the mortgaged property comprised in Kyadondo Block 2018 Plot 1342 at Kawempe, the Bank's agents have persistently continued to advertise the mortgage property, serving eviction notice as well as soliciting for buyers who have inspected and taken pictures thus causing tension, if the injunction is not granted the main application will be rendered nugatory and useless, the main suit disclose a *prima facie* case with a probability of success and it is in the interest of justice that the temporary injunction be issued.

In reply Mr. Arocha Joseph stated that the decline to give the applicant a credit facility is not a breach of contract as there is no contract to breach at that time, the applicant pledged his property comprised in Kawempe as security for the loan and defaulted on his repayment, the facility was restructured on 5th May 2015 but the applicant still defaulted on his loan repayment obligations, the respondent was prompted to commence the recovery process to get back its money as a natural course of the law, the applicant's facility was 72 days in arrears amounting to UGX 13,104,992.47/= as at November 2015 and is not entitled to a temporary injunction, the main suit has no chance of success as there is no action against the Bank disclosed by the plaint, it is in the interest of justice that the application is dismissed with costs as it lacks merit, the balance of convenience is in favour of the respondent as she is strained by the applicant's defaults.

Applicant's Submissions

Counsel for the applicant submitted that law on injunction is contained in Order 41 rules 1(a) of the CPR which is to the effect that where in any suit it is proved by affidavit that the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit a court may by order grant a temporary injunction to restrain such act. Making reference to ***Buziranjove Developments Co. Ltd Vs Nantaba Idah Erios Misc Appl. No. 141 of 2013*** Counsel added that the principles governing the grant of temporary injunction are well settled and are that the applicants must show that there is a substantial question to be investigated with chances of success in the main suit that the applicants would suffer irreparable injury which damages would not atone if the injunction is denied, or that the balance of convenience is in favour of the applicants.

Regarding a prima facie case, Counsel relied on the case of ***American Cynamide Vs Ethicon (1975) ALL ER 504*** stating that there is no requirement for the plaintiff to establish a strong prima facie case. Counsel argued that the Bank's agents have continually advertised the mortgage property serving eviction notice as well as inspection thus causing tension.

5 Addressing the principle of irreparable injury, Counsel submitted that the damage must be substantial that cannot be compensated adequately in damages. Counsel contended that if the suit property is alienated or sold to the 3rd party it will be involved in third party claims which shall complicate the suit.

10 Regarding the balance of convenience Counsel submitted that they stand to lose more if the injunction is not granted and relied on the case of ***David Luyiga Vs Stanbic Bank Misc. App. No. 202 of 2012***. Counsel stated that in the event that the temporary injunction is not granted, it will be denied its rightful possession and ownership of the land as the registered proprietor.

Respondent's Submissions

15 Counsel submitted that it is trite law that there are conditions that have to be considered before the grant of a temporary injunction as was laid out in the case of ***Kiyimba Kaggwa Vs Abdu Nasser Katende H.C.C.S No. 109 of 1984***. Regarding a prima facie case with possibility of success, Counsel submitted that the case has no merit and therefore no chance of success owing to the fact that the applicant is in breach of his contractual obligations. Counsel argued that the only subsisting contract is the loan agreement of 5th May 2015 wherein the applicant was offered
20 a loan facility of UGX 137,996,000= . Counsel argued that there is no *prima facie* case with a possibility of success.

Addressing the ground of irreparable damage, Counsel relied on the case of ***Kakooza Abdulla vs Stanbic Bank Uganda Limited Misc. Appl. No.614 of 2012*** in which court held that;

25 “.....the general rule is that sale of property which is pledged as security in a loan agreement or mortgage cannot lead to irreparable loss per se.”

Counsel added that in the case of ***Savours INT. (U) LTD VS DFCU BANK LTD MSC 283/2002*** court held that court should not grant an injunction restraining a mortgagee from exercising his

statutory powers. Counsel argued that the mortgage the Bank seeks to enforce is not in dispute and therefore prayed that the court finds that the applicant will not suffer irreparable injury.

On balance of convenience, Counsel submitted that where court is in doubt of the first two conditions, the balance of convenience will be considered. Counsel cited the case of ***Miao Huaxian Vs Crane Bank Ltd & Anor Misc. Appl. No. 935 of 2015*** where the applicant was granted an interim order without an order for security to be deposited and court held that the interim order was not in accord with the Mortgage Regulations, 2012. The court also set aside the interim order for not having been issued in accordance with the law. Counsel argued that in the instant case, the Respondent's right to sale the mortgaged property was stopped by an interim order. Counsel submitted that the applicant had not proved his case on balance of convenience as required by law and prayed that the application be dismissed with costs.

Decision of Court

I have carefully considered the application and the submissions of both Counsel.

The principles to consider before an injunction is granted were laid out in a number of cases like the case of ***Buziranjove Developments Co. Ltd Vs Nantaba Idah Erios (supra)*** which were ably expounded on by both Counsel.

The application was brought under ***Order 41 rule 1(a) of the CPR*** 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; ... the court may grant an injunction to maintain status quo.”

Counsel for the applicant submitted that there are threats by the respondent to sell off the applicant's property to the extent that the property was even inspected and advertised and therefore it is in eminent danger of being sold. However, it is the evidence of the respondent that the property in question was offered as security by the applicant for a loan. Counsel argued that the applicant took a loan on 5th May 2015 of UGX 137,996,000/= and was 72 days in default. Counsel contended that the declined loan offer that the applicant claims is different from the loan from which the respondent now claims to be in arrears.

In *Matex Commercial Supplies Ltd Vs Euro Bank Ltd (in Liquidation) [2008]1 EA at pg 216* it was held that if property is offered to the bank as security for a loan, it is made on the understanding that the property stands at a risk of being sold by the lender where there is default. It is my considered opinion that applicant should have been aware of the great risk of losing the property were he to default in repaying the loan. I therefore agree with Counsel for the respondent that the presence of the risk alone in this matter is not ground enough to secure the grant of the injunction sought since the respondent is exercising a right it reserved in the mortgage agreement as set out under the Mortgage Act.

That said, it is also imperative to establish whether the applicant has a prima facie case with a likelihood of success. **Black's law Dictionary, 7th Edition at pg 1209** defines prima facie as;

“A party’s production of enough evidence to allow the fact-trier to infer the fact in issue and rule in the party’s favour”

In the case of *American Cyanamid Co. Ltd Vs Ethicon [1975] 1 ALL ER pg 504*, court emphasized that the applicant does not have to show a *prima facie* case with a strong possibility of success but rather satisfy court that there is an arguable case which merits judicial consideration before a conclusion is made on the facts. From the evidence on record I fail to see such arguable case with merit.

In a letter from the respondent dated 3rd September 2015 it is stated:-

“We have given careful consideration to your application but regret to advise that your application was not successful as it did not meet our lending criteria among which include;

- 1. The held security is insufficient to secure the facility applied for;*
- 2. The previous facility was restructured in May 2015, but the Bank requires that the account performance be observed for over a year before any further lending”*

From reading the above I get the inference that the applicant still had a loan obligation pending and the respondent made clear its reasons for not making another loan offer. In my view the

applicant has, as stated earlier not shown an arguable case with merit that would warrant the grant of the temporary injunction sought.

In the result, the applicant has not been able to demonstrate a prima facie case with a possibility of success and has also failed to demonstrate that he will suffer irreparable loss. Regarding balance of convenience, courts have held that where court is in doubt, it can consider the balance of convenience. (See *Kiyimba Kaggwa Vs Hajji Katende (supra)*). It is therefore not necessary to go into the limb of balance of convenience. (See the case of *Labelle Intern Ltd Vs Fidelity Commercial Bank & Anor E. A [2003] 2 Pg 247*).

The application is for the above reasons dismissed with costs.

B. Kainamura

Judge

06.10.2016