

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 846 OF 2016
(ARISING FROM CIVIL SUIT NO 647 OF 2016)
(FORMERLY LAND DIVISION CIVIL SUIT NO 331 OF 2016)

- 1. SERWANGA JOVAN}**
- 2. ABISAGI SERWANGA}**
- 3. JOYCE L. NANSUBUGA}**

T/A WATERFORD NURSERY AND PRIMARY SCHOOL}..... APPLICANTS

VS

DIAMOND TRUST BANK UGANDA LTD}.....RESPONDENTS

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant commenced this application for interlocutory temporary injunction against the Respondent and/or its agents to restrain it from alienating and disposing off all the properties comprised in KIBUGA Block 14 Plots 410 and 833 Najjanankumbi, Entebbe road, KYAGGWE Block 107 Plot 2667 at Mukono and KYAGGWE Block 107 Plot 674 at Nabuti Mukono and for the costs of the application to be provided for.

Counsels filed written submissions. The Applicants are represented by Byamugisha, Lubega, Ochieng & Co. Advocates. The Respondent is represented by MMAKS Advocates.

Applicant's Submissions

The gist of the Applicant's submissions is that the Applicant is in possession/occupation of all the suit land comprised in Kibuga Block 14 Plot 674 at Nabuti, Mukono having been used as security by way of mortgage and subject to the offer letter dated 7th March, 2012 and quoting therein the provision of a fresh term loan facility of Uganda shillings 1,700,000,000/= which referred to and also alleged as having been advanced in cash to Applicants whereas not. What happened is that there was a transfer of the mortgage from the previous mortgager who had failed to service his loan facility to the Applicants.

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In this application the Applicants seek an injunction to restrain the Respondent from alienating and disposing off all the properties comprised in KIBUGA Block 14 Plots 410 and 833 Najjanankumbi, Entebbe road, KYAGGWE Block 107 Plot 2667 at Mukono and KYAGGWE Block 107 Plot 674 at Nabuti Mukono and the sole issue for determination is whether the injunction should be granted as prayed for.

The Applicant claims that by granting the application the status quo of the suit land will be preserved and the suit shall not be rendered nugatory and that the court is enjoined to grant it because by declining to do so would be tantamount to evicting the Applicants from the land by stopping them from running their school business to the new term and it will also result into the applicants losing their marital home yet they are of advanced age and unable to work again and put up shelter.

The conditions for the grant of a temporary injunction were laid down in Spry V.P (as he then was) as follows: The applicant must show a *prima facie* case with a probability of success. Secondly, an injunction cannot be granted unless the Applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience and the applicant must prove that there is a status quo which an order for a temporary injunction is intended to preserve.

On whether there is a status quo the order seeks to preserve, Counsel cited the **Osborn's concise law dictionary 6th Edition and defined the status quo to mean** *the state of things, the way they are as opposed to the way they could be, the existing state of affairs and that to maintain the status quo is to keep the things the way they presently are.*

Counsel for the Applicants submitted that the Applicant is in possession of property comprised in Kibuga Block 14 Plots 410 and 833 Najjanankumbi Entebbe road as well as Kyaggwe Block 107 plots 2667 and 674 land at Nabuti Mukono which comprise the school and his matrimonial home respectively and this is the status quo. He further submitted that the Applicant's evidence in the affidavit in support of the Application is unchallenged and should be taken as absolute truth and relied on the case of **Erunasani Kivumbi and 3 others Vs The Registrar of Titles M.C No. 102 of 2009 where Justice Murangira held that it is settled law that when facts are deposed to in an affidavit and the same are not challenged in rebuttal, the same facts are presumed to be admitted by the other party.** He submitted that the status quo is absolute and undisputed and urged court not to alter it by declining this application and prayed that the application be granted as it seeks to preserve the status quo.

On whether the Applicant has a *prima facie* case with real prospect for succeeding in the main suit?

On this issue the Applicant's Counsel cited the case of **Nsubuga and Another vs. Mutawe (1974) E.A 487** where a prima facie case was held to mean a serious triable issue. Counsel for the Applicant submits that in his Application the Applicant states that at all material time he has conducted primary school business together with his other partners trading as Waterford Nursery and Primary School at Najjanankumbi and the other suit land charged by the Respondent situate at Nabuti Mukono district acts as the Applicant's matrimonial home. He submitted that the Applicants raise several triable issues in the head suit to wit they contend that the Respondent who is the Applicants' bankers have not acted in utmost good faith since they have intermeddled in all efforts of the Applicant to redeem the said mortgaged property. He further submitted that from the onset the Respondent wants to foreclose yet the law pertaining to mortgages avails alternatives to which a mortgagee can find a remedy he is more amenable to the mortgager because it accords the Applicants both the legal and equitable remedy of redemption which right cannot be fettered by declining this application. Counsel further submitted that the Applicants' claim is based on serious triable issues which may be resolved in favour of the Applicant which constitutes probability of success hence there is a prima facie case and the application ought to be granted.

On whether the Applicants will suffer irreparable injury which would not adequately be compensated or atoned for by an award of damages?

The Applicants' Counsel submitted that for the last 20 years the Applicant has struggled to build his school business empire together with his other partners trading as Waterford Nursery and Primary School located at Najjanankumbi comprised in Kibuga Block 14 Plots 410 and 833 at Najjanankumbi respectively and that Kyaggwe Block 107 Plots 410 and 833 land at Nabuti Mukono which is a further charge is matrimonial home to the 1st and 2nd Applicants which if lost will impact on their socio-economic standing and being in the evening stages of his life not granting the application will be a fatal blow to all his life's achievements and perhaps sending him to an early grave which cannot be atoned for by way of damages.

Counsel cited the case of **Meera Investments Ltd vs. Commissioner General of Uganda Revenue Authority M.A 218 of 2006** unreported citing with approval the words of Lord Diplock in **American Cyanamid Co. Ltd vs. Ethicon Ltd(1975)ALLER 504**, where FMS Egonda Ntende held that the *governing principle that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction would be adequately compensated for the loss he would have sustained as a result of the Defendants continuing to do what was sought to be enjoined between the time of the application and the time of trial. If damages in the measure recoverable at Common Law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the Plaintiffs claim appeared at that stage.*

He thus submitted that the Applicants' affidavit discloses irreparable injuries that cannot be compensated by damages and does satisfy the test/principle governing irreparable injury as it is not in dispute that the Applicants are the registered proprietors of both the mortgaged and charged properties and are in advanced age yet they derive their livelihood from that land and prayed that application be granted.

Counsel further submitted that the balance of convenience is in favour of the applicant.

The Applicants' Counsel relied on **Cayne vs. Global Natural Resources P/C (1984) ALLER 225 at 237** where Sir Robert Meggarry held that *the balance of convenience is a phrase which of course is always used in this type of application. It is, if I may say so, useful shorthand but much...The balance that one is seeking to make is more fundamental, weightier than mere convenience. I think that it is quite clear from both cases that although the phrase may be substantially less elegant, the balance of risk of doing an injunction.*

As far as the facts of this case are concerned the Applicant's Counsel submitted that the balance of convenience does not favour the Respondent but the Applicant who is in physical possession and control of the land which fact is not disputed by the Respondent and it will be a great injustice if the application is not granted because the Applicants will be evicted and the bank will foreclose. Furthermore since the Respondent has neither possession nor has it foreclosed, he prayed that court grant the application to avoid the absurdity.

Reply by the Respondent's Counsel

On the background of the case the Respondent's Counsel relied on facts disclosed in the Plaintiff and Affidavit in support of the Application and submitted that the Applicants admitted being indebted to the Respondent and all they want is more time to settle the debt. It followed that there is no serious question for trial in this suit and prayed that the suit be dismissed.

Irreparable injury

The Respondent's Counsel submitted that according to the facility letter dated 3rd April, 2014 property comprised in Kibuga Block 14 Plot 410 and 833 was purchased using the Respondent's money as such the Applicants cannot suffer irreparable injury in respect of these properties which were purchased using the Respondent's monies and since they agree to sell them that means if they are sold they will not suffer irreparable injury and as such he prayed that the application be dismissed.

On the balance of convenience

The Respondent's Counsel submitted that this ground as well is not in favour of the Applicants since they operate a school on the suit properties at Najjanankumbi save for Kyaggwe Block 107 Plot 674 and any person or entity that buys the mortgaged properties will take over management
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of the school. Alternatively he prayed that the court invokes Regulation 13 (5) of the Mortgage Regulations 2012 and the Applicants be ordered to deposit under that provision 50% of outstanding sum being Uganda shillings 1,243,349,040/= as a condition for stopping the sale.

Submissions in rejoinder

In rejoinder the Respondent's Counsel submitted the brief facts advanced by the respondent are highly contradictory and do not tally with the Respondent's pleadings and Affidavit in reply and should not be believed because the purported service of statutory notices on the applicant were never served onto the Applicants and there is no proof of such receipt. He further submitted that when the respondent alleges that there was both hand and postage delivery, it is false because the local and common physical address of the Applicant is known to all.

He further submitted that the requirement to prove default and notice are not couched in mandatory language because the mortgagee had other remedies and does not have to give notice of default. In the instant case a default has to be established and time of 45 days given for rectification of the default which was not done. The status quo remains that the Applicants are in possession of the mortgaged property and that the Respondents have not yet foreclosed. He prayed that the application is granted.

Ruling

I have duly considered the application for a temporary injunction together with the evidence by affidavit in support of the application. I have also considered the principles of law for the grant of a temporary injunction and the written submissions summarised above.

The grant of a temporary injunction is an exercise of the court's discretion for purposes of maintaining the status quo until the question to be investigated in the suit is tried on the merits and disposed off finally. The principles for grant of a temporary injunction are summarised in the case of **Giella vs. Cassman Brown & Co Ltd [1973] 1 EA 358** where Spry VP at 360 held that:

“The conditions for the grant of an interlocutory injunction are now. I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

According to Lord Diplock in **American Cyanamid Co. Ltd v Ethicon [1975] 1 ALL E.R. 504** at page 510 all that the Plaintiff needs to show by his action is that there are serious questions to be tried and that the action is not frivolous or vexatious.

The first test is whether the applicant's suit disclosed a *prima facie* case with a probability of success or whether there are serious questions to be tried.

The Applicants application was founded on Order 41 rules 1 (a) of the Civil Procedure Rules which provides inter alia that where it is proved by affidavit or otherwise that "any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree", the court may grant an injunction to maintain the status quo.

I have duly considered the application as it is to establish whether it has been proved by affidavit or otherwise that the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit and whether there are serious questions to be tried.

The order sought in the application is for a temporary injunction to restrain the respondent/defendant, her agents, servants/assignees or anyone acting under her authority from alienating and disposing of all the properties comprised in Kibuga block 14 plots 410 and 833 Najjanankumbi, Entebbe road, Kyaggwe Block 107 plot 2667 at Mukono and Kyaggwe block 107 plot 674 at Nabuti Mukono. Secondly the applicants pray for costs of the application to be provided for.

The grounds averred in the chamber summons are that the respondent issued a notice of default on the mortgagor and has threatened to foreclose all properties described above. Secondly that the respondent has not served the applicants with a notice of default/sale as prescribed by law nor has she engaged the applicants with alternative means to clear the loan and/or redeem the said mortgages. Thirdly that the property comprised in Kyaggwe Block 107 Plot 674 at Nabuti, Mukono is matrimonial property for which no consent was obtained. Fourthly the property comprised in Kibuga Block 14 plots 410 and 833 Najjanankumbi, Entebbe road is sufficient to fully secure the outstanding loan facility without necessarily placing other charges on other properties. Fifthly the interest and penalties charged by the respondent is unfair, unreasonable and unconscionable and warrant the revision or indulgence of this honourable court. On the sixth ground, the applicants aver that the conduct of the defendant or her servants/agents in offering acrimoniously to auction the property on Kibuga block 14 plots 410 and 833 Najjanankumbi, Entebbe road at a public auction to intending purchasers solicited and recommended by the defendant shows lack of good faith and transparency in the transaction. On the seventh ground that the continued sale of the properties shall render the applicants and the entire family, homeless/destitute causing irreparable injury which cannot be adequately atoned for by an award of damages. Lastly that the main suit has a high probability of success and it is in the interest of substantive justice that this court grants the orders sought until disposal of the suit.

The application is supported by the affidavit of the first applicant/plaintiff. In paragraph 3 of the affidavit he deposes that the respondent has not issued a notice of default subsequent to the lapse

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of the mandatory default period but has rather attempted to foreclose all properties described in the application. Secondly, the respondent has not duly served them with notice of sale as prescribed by the law. Thirdly the property comprised in block 107 plot 674 is matrimonial property and no spousal consent was obtained for it. He word for word repeats the averments in the chamber summons that I do not need to repeat.

No attachments are included in the affidavit in support of the application. It is contended that the respondent issued a notice of default on the mortgagor but no particulars of the mortgage have been given. The assumption is that all the property as described in the order sought is mortgaged by the applicants to the respondent.

Secondly, the respondent complains that no notice of default/sale as prescribed by the law has been issued by the respondent. This application was filed in July 2016. There is no additional fact in the supplementary affidavit in support of facts showing or demonstrating that the applicants have since the notice of default tried or have been paying the outstanding sums.

By an affidavit in rejoinder filed on 9th November, 2016 the first applicant discloses further facts by affidavit that there was a previous mortgage of the premises by one Hajji Abdu who mortgaged the facility with the bank which was long overdue and he opted to look for a buyer to clear the bank. They negotiated with the bank personnel and agreed to inherit the loan facility by swapping individual titles as security. The applicants were neighbours to the mortgaged facility and upon advice from Diamond Trust Bank sought to enlarge the boundaries of the school business by keeping both their premises as well as the new premises. They were forced to prematurely enter into the mortgaged premises which were not habitable for a school at that time and they were forced to obtain further overdrafts from the respondent to meet the requirements of the new premises. He contends that the bankers were aware that the applicants underwent constraints to service the transferred loan facility. The bankers acted on a valuation report originally obtained by them from the said Hajji Abdu Kasai projecting Uganda shillings 6,000,000,000/= being the market value and Uganda shillings 4,000,000,000/= being the forced sale value. Uganda shillings 1,700,000,000/= were not handed over to the applicants in cash but rather the bank repaid itself from the previous mortgagor and the applicants inherited the loan facility by swapping. By the bankers adding a further charge on other property, it was unfair and unconscionable. No statutory notices under the Mortgage Act were duly served on the applicants i.e. notice on default and notice of sale. Given the common school premises known to the respondent, there was no need to use posted services which notices never reached the applicants.

The applicant disputes on the basis of the affidavit in reply that Uganda shillings 2,708,430,422/= was due from the applicants and continues to attract interest at a contractual rate since the status quo was maintained by an interim order and the true decretal sum is yet to be determined inter partes.

He further deposes that the mortgage deed stipulates other modes of recovery other than foreclosure as the first option. The respondents intend to deprive the applicants of their right to redeem the mortgaged property contrary to doctrines of equity and common law. Furthermore the applicants exhibited an arguable case which warrants the intervention of the court. He further contended that the affidavit in reply is full of falsehoods and a close scrutiny of the main suit raises triable issues.

By supplementary affidavit in reply, the respondents Head of Recoveries Mr Paul Ndayisenga on the issue of consent to mortgage matrimonial property deposed that the property in question was mortgaged by the first and second applicants who are husband and wife and the wife duly signed the spousal consent form according to the attachment Annexure "A" and "B".

I have further considered the applicants application where it is averred that the interest and penalties charged can be met by part of the property. It is further averred that the penalties charged by the respondent are unfair, unreasonable and unconscionable and warrant revision by this court. The rate of interest is not given, the agreement is not given and no specific facts are given both in the application and in the affidavit in support of the application. No facts relating to the offer to sell the property by public auction are given. These facts are glossed over and instead it is the respondent who attached the agreement. The applicant then in the affidavit in rejoinder adduced an agreement between the respondent and Waterford Nursery & Primary School and Hajji Abdu Kasai.

The Plaintiffs action in the plaint is for a declaration that the intended sale of the suit properties is improper, premature, unconscionable, and null and void. Secondly, it is for a permanent injunction to restrain the defendant, her agents and any one acting under authority from alienating, selling or disposing of the suit properties. Alternatively, it is for an order for invocation of other legal recovery means such as joint administration of the school other than foreclosure by the bank. It is further for a declaration that the interest and penalties charged and accruing daily is unfair, unreasonable and unconscionable. The plaintiffs/applicants also seek general damages and costs of the suit.

In support of the suit, the facts disclosed are that the plaintiffs purchased the land and buildings from Waterford Nursery & Primary school from one Kasai Abdul and it is situated at Kibuga block 14 plots 410 and 833 at Najjanankumbi. Prior to the purchase the previous owner was a customer of the respondent. Upon the purchase all the loan obligations which initially were that of the vendor automatically fell upon the plaintiffs who secured the loan facility with the same property and additional property comprised in Kyaggwe block 107 plot 2667 and 674 in Mukono. The applicants admit that in order to sustain working capital to sustain the school business as well as meet loan obligations on several occasions the first and second applicants obtained overdraft facilities from the defendant bank. It is further averred that due to hard

financial conditions, the plaintiffs have been prevented from settling both the revolving loan facility and overdrafts which has now accumulated to colossal sums.

The plaintiff's contention is that there is a discrepancy between monies owed to the defendant and the current market value of all the properties securing the mortgage to warrant an injunction restraining the intended sale. Secondly, the respondent had not observed the statutory requirement of serving the notice of default upon them and there was procedural impropriety in the intended sale. The plaintiff also alleges that no spousal consent was obtained in respect to the property in Mukono Kyaggwe block 107 plot 674 at Mukono. The plaintiff attempted to negotiate for a re-scheduling of the loan but the defendants/respondents refused. There is no specific averment about what the outstanding loan amount is.

The plaintiffs applied for and obtained an interim injunction by consent of the parties when the matter was referred by the Land Division of the High Court to the commercial division pending further directions from the commercial court on 14th July, 2016. On the other hand the defendant/respondent in the written statement of defence avers that the plaintiffs/applicants at the time of filing on 24th June, 2016 were indebted to the respondent bank in the amount of Uganda shillings 2,386,405,854/= and Uganda shillings 229,346,450/= which sum continue to attract interest at a contractual default rate.

On the other hand in the affidavit in reply to the application some facts are given. The affidavit in reply is that of Timothy Lugayizi an advocate practising with Messrs MMAKS Advocates.

His deposition is that the applicants admit indebtedness to the respondent. Secondly that pursuant to the indebtedness, the respondent issued the relevant statutory notices under the mortgage act and the notices were duly served and this specifically are the notice of default and the notice of sale. He attached copies of the notices and proof of postage/service. He further deposes that by 17th October, 2016 Uganda shillings 2,708,430,422/= was due from the applicants. He contended among other things that the injunction can be granted if the applicants deposit Uganda shillings 1,354,215,211/=. Secondly, the respondents do not have a *prima facie* case with a probability of success because the admitted being indebted to the respondent and only request for more time as pleaded in paragraph 6 of the plaint within which to pay the debt. Thirdly, the second applicant executed all the security documentation in respect to plot 674 and cannot raise the defence of failure to obtain spousal consent.

In considering whether the applicant's application discloses a *prima facie* case, it is not necessary to consider the affidavit in reply to the application. A *prima facie* case is disclosed by the applicant's pleadings and affidavit in support of the application. Order 41 rule for 1 (a) of the Civil Procedure Rules expressly provides that the applicant has to prove his or her case by affidavit or otherwise. They have to be serious questions disclosed for trial. In other words it is necessary to adduce the evidence which disclose the *prima facie* case.

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I have accordingly considered the averments. With regard to the averment which discloses a question for trial that the property comprised in Kyaggwe Block 107 plot 674 at Nabuti Mukono is matrimonial property for which no consent was obtained. However it is not disclosed in the application who mortgaged the property and who is the spouse. There are no sufficient facts given as to the circumstances under which the property was mortgaged. The respondent on the other hand demonstrated that the second applicant who is the spouse signed the mortgage and executed the statutory spousal consent.

It is further averred that the property comprised in plots 410 and 833 Najjanankumbi, Entebbe road is sufficient to fully secure the outstanding loan facility without placing charges on other properties.

Without particulars of which property was mortgaged, it is not a question of placing charges on other properties but rather whether the applicants mortgaged the property. Who were the signatories to the mortgage? The applicants admit in the plaint that they mortgaged the property and therefore the property is security for the further overdrafts they took. No *prima facie* case is disclosed on this ground.

Regarding unfair interest and penalties, no facts are given. Regarding the conduct of the defendant or servants, no further sufficient facts are given.

Having considered the fact that the applicants do not challenge the notice of default which gives the indebtedness by 30th of March 2016 at Uganda shillings 2,486,698,081/= plus further interest accruing from 4th April, 2016, it was incumbent upon the applicants to give particular facts as to whether they had been paying and why there are triable issues in the relation to the indebtedness which seems not to be in issue. The issue of hardship that the applicants are experiencing is that of entering into unfavourable terms of contract though how it is unfavourable needs to be particularised.

Property is mortgaged on the assumption that where there is a default in payment, it can be used to secure the repayment either by management of the property or through sale or foreclosure of the right of the mortgagor to redeem the property. In the case of **Matex Commercial Supplies Ltd and another vs. Euro Bank Ltd (in liquidation) [2008] 1 EA at page 216** it was held that any property whether it is a matrimonial home or a spiritual house which is offered as security for a loan/overdraft is made on the understanding that the property stands at the risk of being sold by the lender if default is made on the payment of the debt secured.

In **Maithya vs. Housing Finance Company of Kenya and another [2003] 1 EA at page 133** it was held that securities are valued before lending and loss of property by a sale is contemplated by the parties even before the security is formalised.

An agreement operates as estoppels against the party trying to assert something different from that mentioned in the agreement. Generally, insufficient facts have been presented for the court to conclude whether there is a *prima facie* case on most issues. The main issue I have seen is the procedural issue of serving the applicants through the post instead of through the physical contact. The question of whether the applicants were duly served can be considered by perusal of the mortgage deed as to what mode of service was agreed to.

By Mortgage agreement dated 9th September 2014 the applicants mortgaged various properties to the respondent bank under paragraph 2 thereof. Paragraph 13 provides that:

"NOTICES AND DELIVERY OF INFORMATION"

Any notice to be served or communication to be made under or in connection with this Mortgage shall be made in the address indicated in this Mortgage or any other address furnished by the Mortgagor and the Principal Debtor."

The question raised is therefore a procedural question though it is specifically provided that the address of the applicants is Jovani Serwanga T/A Water Ford Nursery and primary school P.O Box 351 Kampala.

I have considered the Mortgage Act on the issue of service of the statutory notices. Regulation 6 of the Mortgage Regulations 2012 requires every notice or other document required by the Act or the Regulations to be given to the mortgagor to be sent to the address given by the mortgagor at the time of entering into the mortgage. Finally regulation 7 of the mortgage regulations requires the mortgagor to notify the mortgagee of change of address and specifically provides as follows:

"An act or proceeding taken by the mortgagee shall not be affected by the mortgagor's claim of a subsequent change in address that was not notified to the mortgagee.

The above notwithstanding, provisions as to notice to the mortgagor are fundamental because they give the mortgagor an opportunity to exercise the equity of redemption. Regulation 8 of the Mortgage Regulations 2012 requires sale by the mortgagee to be by public auction and prescribes certain notices to be given to the public and to the mortgagor. A person who contravenes the regulation commits an offence.

In the premises the applicant's application and affidavit evidence discloses no sufficient *prima facie* case for the grant of an injunction and in the main only raise issues of a procedural nature as concerns statutory notices. The Statutory regime is that whether the mortgagor has no defence, the equity of redemption is preserved by regulation 13 of the Mortgage Regulations and can be applied.

The above notwithstanding, the applicant has not demonstrated that it has made attempts or that they have made attempts to pay off the loan. The burden is not on the respondent to move the applicants to the negotiating table. Regulation 13 of the Mortgage Regulations 2012 puts the burden on the applicant to prove by affidavit or otherwise that the mortgaged property is in danger of being sold by public auction. Either the advertisement is to be attached to the application or sufficient details as to when the sale was supposed to take place are to be presented to the court. Secondly, the applicant should demonstrate in terms of regulation 13 of the Mortgage Regulations 2012 that it has deposited at least 30% of the forced sale value of the mortgaged property or the outstanding amount. In the very least it should show that it is making attempts to clear its outstanding liability.

No effort was made to demonstrate in any material way what is happening in terms of payment being made or efforts to settle the loan amount or to make an undertaking to pay off the loan which has been admitted in the application itself. The applicant clearly averred that some of its properties or some of their properties is sufficient to meet the loan obligation. Details of the loan obligation are not mentioned instead the applicant presents the mortgaged property as being sufficient.

In the premises the application lacks merit and regulation 13 will be applied on grounds of waiting to establish whether the procedural steps prescribed by law were duly taken. In any case the respondent cannot sell the property without re-advertising it as prescribed by regulation 13 (7) of the Mortgage Regulations the sale having been stopped by consent of the parties in July 2016 and the stoppage having lasted more than 14 days. Therefore fresh notice is prescribed by the law. For that reason I agree with the respondent's counsel that in the alternative if the application is not dismissed with costs, a conditional injunction can be granted. The requirement for deposit is statutory and will be operational upon the respondent re-advertising the property for sale. A conditional injunction will accordingly be granted on the following terms:

1. The respondent shall, re-advertise the property for sale if the applicants do not comply with the terms of this order namely:
 - a. The Applicants shall rectify any default at the time of this order within 21 days from the date of this notice by paying all arrears and being on schedule in loan repayments as agreed.
 - b. Upon failure to rectify the default the Respondent shall be entitled to re-advertise the property for sale though the intended sale, if ensures as prescribed above, can be stopped by the applicants depositing 30% of the outstanding loan amount before sale as notified and as prescribed by Regulation 13 of the Mortgage Regulations.
 - c. Costs of this application shall abide the outcome of the main suit.

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Ruling delivered in open court on 13th January, 2017

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Steven Zimula for the Respondent

Counsels Kibedi Evans for the Applicants

Applicants absent

Respondent's officials absent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

13th January 2017