

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
MISCELLANEOUS APPLICATION NO 891 OF 2016  
(CIVIL SUIT NO 679 OF 2016)**

- 1. TONNY ODORA t/a TONI ENTERPRISES  
And ABELA CONSTRUCTION COMPANY LTD}**
- 2. OKELLO CHARLES}**
- 3. DAVID OCENG}**
- 4. LOKA & SONS LTD}.....APPLICANTS**

**VERSUS**

- 1. DIAMOND TRUST BANK}**
- 2. TRUST GENERAL AUCTIONEERS & COURT BAILIFFS}.....RESPONDENTS**

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

**RULING**

The Applicants filed this application for a temporary injunction to issue to restrain, prohibited and prevent the respondents, their agents, servants or persons deriving title or authority from them from selling, transferring, evicting, possession, dealing and or disposing of property comprised in LRV 3550 Folio 1 Plot 21 LADAA MOHAMMED ROAD, GULU, LRV 663 Folio 9 Plot 29A Kitgum Road Gulu, LRV 3583 Folio 25, Plot 10 Commercial Road and LRV Plot 26 Olya Road, Gulu in any manner whatsoever until the disposal of the main suit. Secondly the applicants pray for costs of the application to be provided for.

The grounds of the application in the chamber summons are as follows:

1. The Applicant obtained a loan facility from the first defendant and deposited as security the above written properties, which property has been illegally and unlawfully advertised for sale by the second defendant.
2. The second defendant has written to the demands occupied in the above-mentioned properties and threatened them with the eviction from the premises which action is illegal and unlawful.
3. The applicant has filed a suit in this honourable court which has a prima facie case with a reasonable probability of success.

4. If the temporary injunction order does not issue the applicant would suffer irreparable injury which cannot be atoned for by an award of damages.
5. The balance of convenience is in favour of the applicants.
6. It is in the interest of justice that this application is granted.

The application is supported by the affidavit of Tony Odora, the first applicant. He deposes that he trades as the first applicant and therefore made in the affidavit in that capacity. He deposes that between 2013 and 2014, he obtained a loan facility from the first defendant according to a copy of the loan documents which are attached to the application. The loan facility was secured by Ms of property described in the chamber summons above. He was paying the first defendant the loan amount is directly through its bank account or through its lawyers Messieurs MMAKS advocates according on 4<sup>th</sup> April, 2016, he was shocked to read an advertisement in the Monitor newspaper that the suit properties were going to be sold after 30 days from the date of the advertisement. On 2<sup>nd</sup> September, 2016, he was further shocked to receive a letter from the second defendant ordering tenants occupying the premises to vacate or else be evicted in order to proceed with the sale. His property was advertised without giving him notice of default, demand notice or an opportunity to redeem his property without ascertaining what amount remained outstanding. He has not reconciled with the first defendant or its agents advocates for the second defendant the outstanding loan amount with specific details of how much was paid and how much remains outstanding. He deposed that advertising his property for sale while he was still servicing the loan amounted to breach of contract and was unlawful or illegal. According to the contract signed between himself and the second defendant, the security of the loan, in the event of default was not to be sold together with or without recourse to court. The loan facility obtained from the first defendant is not governed by the Mortgage Act and no reference was made to it in any of the contracts signed between himself and the first defendant either expressly or by implication. The second defendant cannot sell off his property under the Mortgage Act when the parties did not agree to any mortgage either by implication or expressly.

He deposes that he suffered and continues to suffer irreparable loss, anguish, and injured feelings due to the conduct of the defendants and he has instituted suit in this court within a reasonable probability of success. The sale of the properties should be stayed and the status quo maintained pending disposal of the application.

The affidavit in reply is that of David Mukiibi Semakula, an advocate of the High Court of Uganda practising with Masembe, Makubuya, Adriko, Karugaba & Ssekatawa advocates (MMAKS advocates), counsel for the respondent in which capacity he made the affidavit. Having perused the application and the affidavit in support of the reply is as follows:

Okello Charles according to the consent and relevant documentation in civil suit number 29 of 2012 duly transferred all his interest in the property comprised in LRV 663 Folio 9 in favour of Odora Toni and has no cause of action in the present suit. It follows that there is no prima facie

case established in respect of FRV 663 Folio 9 by Okello Charles. His application ought to be dismissed.

Loka & sons also has no interest whatsoever in the suit properties plot 10 registered in the names of David Ocen, Plot 26 Olya Road is registered in favour of Tonny Odora, and Plot 21 Ladaa Mohammed Road is registered in the names of Tonny Odora. Consequently they have no interest and the application ought to be dismissed. David Ocen granted powers of attorney to Tonny Odora on 21st of October 2011, allowing him to secure credit facilities using the title of plot 10 commercial Road from any financial institution.

By letter dated 7<sup>th</sup> September, 2016 which letter was written after this suit had been filed, David Ocen admitted being indebted to the first respondent and undertook to settle the debt. He has so far paid Uganda shillings 20,000,000/= in partial settlement of his debt. Accordingly he has no interest whatsoever in pursuing the present suit since he is admitting the debt and wants to amicably settle. The application in respect of plot 10 commercial Road ought to be dismissed.

The first applicant is presently indebted to the bank in the sum of Uganda shillings 3,113,393,525/=. The outstanding amount was arrived at after deducting Uganda shillings 280,000,000/= that was paid by the applicant. As a result of the applicant's indebtedness to the bank, the bank issued the relevant statutory notices which include notice on default and notice of sale and the notices were duly served on the applicant by registered post. Subsequently the applicant executed the security realisation agreement where he admitted being indebted to the bank/first respondent and undertook to settle the debt failure of which the bank would proceed to sell the mortgaged properties according to a copy of the agreement annexure "F".

Alternatively the respondent relies on regulation 13 (1) and (5) of the Mortgage Regulations 2012 and proposes that the applicant deposits in court a sum of Uganda shillings 1,556,699,264/=.

The application had first been fixed on 22 December 2016 but the applicants were not in court neither was their counsel. They were served by the respondents counsel. When the matter came on 11<sup>th</sup> January 2017, Counsel Steven Zimula represented the respondent while Counsel Andrew Sebugwawo represented the applicant. By agreement of the parties, it was proposed that an amicable settlement of the dispute should be explored and the application was adjourned for mention on 31<sup>st</sup> January, 2017. On 31<sup>st</sup> January, 2017, no settlement had been reached because no effort had been made to mediate in the matter. The application was adjourned for mention on 9<sup>th</sup> February, 2017 for the counsels to appear with their clients or representatives with information as to whether an effort to settle the suit was in progress or not and the way forward.

On 9<sup>th</sup> February, 2017 the applicants counsel informed court that there was difficulty in arriving at the settlement and proposed that the court be addressed in the written submissions on the application. A schedule was given for the filing of written submissions and the subsequent

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extension of time was granted to the applicant to file a rejoinder to the affidavits of the respondent.

I have accordingly considered the submissions. The record shows that the supplementary affidavit was filed by the respondents counsel on 2<sup>nd</sup> March, 2017 introducing additional facts. Counsel David Mukiibi deposed that in addition to his earlier affidavit sworn on 19<sup>th</sup> September 2016, Tonny Odora and Diamond Trust Bank Uganda limited executed various facility letters and the mortgages in respect of the suit properties which were collectively attached and marked annexure "A". Secondly by a memorandum of understanding between Tonny Odora and the first respondent, the applicant admitted being indebted to the bank in the sum of Uganda shillings 2,953,546,107/= according to a copy of the memorandum of understanding attached.

The applicant's submissions were filed on 17<sup>th</sup> February, 2017 while the respondent's submissions were filed on 2<sup>nd</sup> March, 2017, the same date as the supplementary affidavit. Finally the applicant filed submissions in rejoinder on 17<sup>th</sup> March, 2017.

The plaintiff's counsel relied on the chamber summons and the affidavit in support which has been set out above. In the written submissions he added that it is trite law that for an injunction to issue, the applicant must show that they will suffer irreparable injury which cannot be atoned by an award of damages and the balance of convenience is in their favour. He contended that the advertisement of the property for sale was premature. The property was advertised for sale on 4<sup>th</sup> April, 2016 in the Monitor Newspaper. By the time of the illegal advertisements, the applicant was servicing his loan and paid money to the defendant bank into his loan account. However the defendant bank has not availed his loan statement for the court to verify and examine. Furthermore the money the applicant was supposed to pay was channelled to MMAKS advocates according to a copy of the receipt attached to the application marked annexure "B". Before the applicants property should be advertised for sale, the defendant bank should reconcile the applicants loan account and issue a notice of default after such reconciliation of accounts. It is only through such reconciliation that the applicant would know what he owed the bank and what he had to pay into the bank.

Secondly, annexure "A" to the application is the agreement the defendant bank executed with the applicant. In clause 6 thereof, which gives deals with the default, it does not indicate that in the event of such default, the applicant's property deposited as security for the law would be sold off without recourse to court. In the premises the respondent's advertisement of the applicant's property for sale without recourse to court was done in breach of the agreement.

The applicant's counsel further submitted that the second respondent wrote to the applicants instructing them to vacate the premises to enable the sale of the property to proceed without any hindrance failure of they would be evicted at their own cost.

The threatened eviction was not supposed to be done without recourse to court. He further contended that this was especially the case where the occupants of the said houses have not been given prior notice of the activities of the respondent with regard to the property.

Furthermore, the applicants counsel submitted that a seven days notice to an occupant is too short for the person to organise facts, logistics and arrange himself/herself and therefore get alternative accommodation and move into that alternative accommodation at such short notice all within a short time. In the premises if the injunction is not issued, the applicant would suffer irreparable injury.

The applicants counsel further objected to the affidavit in reply to the application on the ground that the applicant is represented by MMAKS advocates who also authored some of the documents attached. They also instructed the second respondent to advertise the property for sale. They received payments from the applicant on behalf of the first respondent. Consequently they are potential witnesses and as such should not act as advocates in the same matter.

Thirdly, counsel submitted that an advocate is not allowed to swear an affidavit on information provided to him by a client where the client is available to swear that affidavit out of their knowledge and belief according to the case of Yusuf Gani vs Fazal Garage (1955) 28 KLR 17 (K). The affidavit in reply to the application is that of David Mukiibi Semakula, an advocate with MMAKS advocates, counsel for the respondent and it is defective in that the advocate is deposing to facts based on information supplied to him by the respondents yet the respondents are available to make the same affidavit on the basis of their own knowledge.

In reply, the defendant's counsel submitted that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants had transferred their interest in the suit properties for which an injunction is sought, to the first applicant and cannot file this application because they have no cause of action (see **Auto Garage versus Motokov [1971] EA 514** at 519). Consequently he submitted that the application ought to be dismissed.

With regard to the conditions for the grant of a temporary injunction, the respondent's counsel submitted that it is well laid out in the case of **Giella versus Cassman Brown and Company Limited [1973] EA 358**. The grounds are that the applicant must show a prima facie case with a probability of success. Secondly the injunction would not be granted unless the applicant might otherwise suffer irreparable injury which cannot be compensated by an award of damages. Thirdly if the court is in doubt, it will decide the application on the balance of convenience. He further relied on the holding of Lord Diplock in **American Cyanamid Company Ltd versus Ethicon [1975] 1 All ER 504** and 510 that all that the plaintiff needs to show by his action is that there is a serious question to be tried and that the action is not frivolous or vexatious.

With regard to whether there is a prima facie case, counsel relied on the memorandum of understanding in which the applicants acknowledged being indebted to the respondent in the amount of Uganda shillings 2,953,526,107/= in consideration of the bank agreeing to  
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stay/postpone the sale of the debtors mortgaged properties. The first applicant admitted the debt and for this reason alone does not have a prima facie case. Secondly out of the Uganda shillings 2,953,526,107/=, which continues to attract interest, the applicant only paid Uganda shillings 290,000,000/=.

Secondly the applicants were served with the relevant notices as indicated in paragraph 10 of the affidavit in reply and annexure "E". These are the notice on default, and notice of sale which are also duly received by the applicants who indeed acknowledged receipt thereof. The notices indicated that a sum of Uganda shillings 2,245,978,541/= was due and unless they paid the property would be sold. The second and fourth defendants have no interest whatsoever in the suit properties and as such cannot in any way contract with the respondent. The third defendant gave a power of attorney to the first defendant allowing him to secure credit facilities from any financial institution using the title of property comprised in LRV 3583 Folio 25 Plot 10. On 7<sup>th</sup> September, 2016 in annexure "C" to the affidavit in reply, the third applicant admitted that the property was mortgaged to the bank and that they were proceeding to settle the matter amicably by sending an alternative piece of land.

In paragraph 11 of the plaint, the applicant admits obtained a loan facility and that the facility is not covered by the Mortgage Act. However the facilities letters dated 22<sup>nd</sup> August, 2011, 21<sup>st</sup> December, 2011, 5<sup>th</sup> July, 2012 in their respective clause 7 clearly indicate that the facilities would be secured by mortgages of the properties comprised in FRV 663 folio 9 plot 29A, LRV 3583 folio 25 plot 10 and plot 26 as described in the application and consequently mortgages were registered on the titles to the suit properties. In the premises the respondents counsel submitted that the suit is frivolous and vexatious and there is no prima facie case which has been disclosed.

With regard to irreparable injury, the respondent's counsel relies on the case of *Kakooza Abdullah versus Stanbic Bank (U) Ltd* High Court Miscellaneous Application No. 614 of 2012 for the holding that the sale of mortgaged property pledged as security for a loan or mortgage cannot lead to irreparable loss because it is the contractual arrangement or intention of the parties and is expressly provided for in the loan agreement or mortgage. This is in relation to the cited Kenyan cases of **Matex Commercial Supplies Ltd and another versus Euro Bank Ltd (in Liquidation) [2008] EA page 216.**

In the premises he submitted that the applicants have not proved the two conditions for the grant of a temporary injunction and for that reason the respondents counsel prayed for dismissal of the application.

In the alternative, counsel relied on regulation 13 of the Mortgage Regulations 2012 for the applicant to pay a deposit of 50% of the outstanding amount to secure an injunction.

Finally he submitted that the affidavit of David Mukiibi is properly before this court. He swore the affidavit as counsel for the respondent who had authority to do so.

In rejoinder the applicants counsel submitted that the notice of default dated 12<sup>th</sup> September, 2013 is addressed among others to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants. Consequently that alone gives them the right or locus standi to bring a suit against the defendants/respondents to secure and protect their stay on the suit property. The respondents cannot at this stage having issued the notices turn round after publishing the names of the other applicants, deny that they have a cause of action and interest in the suit property. A suit is properly before the court and is not frivolous or vexatious and there is a prima facie case.

Counsel further submitted that the issue for trial is whether the defendants/respondents could legally sale off the plaintiffs/applicants properties without recourse to court. Secondly the applicant's case is for recovery of the land which was retained to be sold by the defendant's without their knowledge and a permanent injunction to restrain them. The suit stands a chance of success because there is evidence to show that the first applicant has been paying his debt as evidenced by the receipts attached to the affidavit of the applicant.

Thirdly the applicant will suffer irreparable damage if the temporary injunction is denied. The respondents are so eager and anxious to sell off the applicant's properties, having attempted to do so earlier on without the knowledge of the applicants they may go ahead and sell the property before the main suit is determined and may do so to the detriment of the applicants. It will be hard to get back the valuable properties. He further submitted that the court ought to maintain the status quo pending disposal of the suit on merits.

Finally counsel submitted that the balance of convenience favours the grant of a temporary injunction.

## **Ruling**

An application for a temporary injunction is made under Order 41 rule 1 of the Civil Procedure Rules and the application should disclose by pleadings and affidavit evidence or otherwise prima facie case or arguable questions of fact or law which ought to be tried. The applicant should show that the action is not frivolous or vexatious.

I have considered the applicants objection to the affidavit of Semakula Mukiibi who is an advocate practising with MMAKS advocates. The issue is whether he is likely to be a witness in the application or in the suit and at the same time appear as counsel.

The objection is presumably based on the **Advocates (Professional Conduct) Regulations SI 267 – 2** and **Regulation 9** thereof which forbids an advocate who is likely to be required to appear as a witness from appearing as counsel in the matter as well. It provides as follows:

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“9. Personal involvement in a client’s case.

No advocate may appear before any court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit; and if, while appearing in any matter, it becomes apparent that he or she will be required as a witness to give evidence whether verbally or by affidavit, he or she shall not continue to appear; except that this regulation shall not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on a formal or noncontentious matter or fact in any matter in which he or she acts or appears.”

In this case Counsel Mukiibi Semakula has not appeared as counsel in court in this application or in the suit. The regulation does not apply to the entire firm of MMAKS advocates and therefore the objection on the ground that an advocate should not be a witness or swear an affidavit and appear in court in the same matter does not apply and is overruled.

The rule does not forbid an advocate from giving evidence either verbally or by declaration or affidavit on informal or non-contentious matters of fact in the matter in which he or she appears. The question is whether the advocate may give evidence in the matter in which he or she does not appear where it is contentious. I have carefully considered the above regulation and it does not bar an advocate from making an affidavit in a contentious matter where he or she will not appear. In fact he or she can testify on matters of fact within their knowledge which they are handling and be cross examined provided the facts are within his knowledge. For an advocate having conduct of the matter in terms of hearing notices, receiving information as to the client’s state of affairs such as the indebtedness of the applicant, counsel basing himself on the written materials, can file an affidavit on this client's behalf provided he will appear as a witness only and not represent the client in the matter. Knowledge of the clients issued based on documents provided by the client, provided they are admissible under Order 19 rule 3 (1) of the Civil Procedure Rules. This rule provides that:

“Matters to which affidavits shall be confined.

(1) Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated.”

In the premises the objection is accordingly overruled.

I have accordingly considered the first issue as to whether the applicant’s application discloses a prima facie case.

A careful analysis of the application demonstrates clearly that the application is only supported by the affidavit of Mr Tonny Odora. That is no averment in respect to the other applicants in the



main application and therefore there is nothing in support of application by the second, third, or fourth applicants. Secondly, the application clearly indicates that it is made on behalf of the first applicant and the first plaintiff. This is in the affidavit in support of the application. Secondly, it relates to a loan granted to the first applicant. It is only in paragraph 3 that it is indicated therein that it is loan secured by the properties of the second, third and fourth applicants.

I have accordingly considered the contention that the loan facility obtained from the first defendant is not covered by the Mortgage Act. The respondents counsel relied on clause 7 of the facility letters annexure "A" which clearly and collectively indicate that the property will be secured by a further charge. The first legal charge is mortgage according to annexure "A" to the supplementary affidavit of David Mukiibi Semakula. In annexure "C" there is a mortgage agreement. It follows that the question of whether the property is subject to the Mortgage Act is not fit to be tried since the documents speak for themselves.

I have considered the second issue as to whether notices were issued and have come to the conclusion that the sale was delayed for more than the stipulated period the sale having been advertised in April 2016. It follows that the property has to be re-advertised. The notices were overtaken by a memorandum of understanding annexure "B" to the affidavit of David Mukiibi Semakula. Even though the memorandum of understanding is undated, a reading of the memorandum indicates that the debtor's namely the first applicant acknowledged being indebted to the bank in the sum of Uganda shillings 2,953,546,107/=. It was agreed that the bank shall postpone the sale of the mortgaged properties until the end of June 2016 in consideration of the debtor making/repayments in the times and amounts stipulated in the agreement.

The question of notice cannot arise where there is an agreement which clearly stipulates that the sale of the mortgaged property would be stayed for consideration of the borrower paying certain sums of money. It is stipulated that the borrower would pay a sum of Uganda shillings 500,000,000/= by June 2016. Secondly, the debtor shall pay a sum of Uganda shillings 500,000,000/= by September 2016. Thirdly, the borrower will pay a sum of Uganda shillings 500,000,000/= by December 2016. Fifthly they would pay a sum of Uganda shillings 500,000,000/= by May 2017. Another similar amount was to be paid by June 2017 and the last balance by September 2017. In paragraph 7 it is provided that in the event of default in the payment of any sums indicated therein, the bank shall be at liberty to proceed with the sale of the mortgaged property whether by public auction or private treaty without further notice to the debtors.

The provisions of law are that a demand which is served on the borrower and not complied with constitutes a default and brings into operation provisions for realising money from the security. Section 19 (1) provides that where money secured by a mortgage is made payable on demand, a demand in writing creates a default in payment. This means that the Mortgagee issues a demand for payment of any arrears. Upon failure by the Mortgagor to clear the arrears, the mortgagee

issues a second notice of default requiring the Mortgagor to rectify the default. The second notice is issued under section 19 (2) and has to be in writing notifying the mortgagor of the default and requiring the mortgagor to rectify the default within 45 working days. The notice has to be in the prescribed form as provided by section 19 (3) of the Mortgage Act. The Mortgagee upon default of the Mortgagor may require the Mortgagor to pay all monies owing on the mortgage; appoint a receiver of the income of the mortgaged land; lease the mortgaged land; enter into possession of the mortgaged land or sell the mortgaged land. The Mortgagee may also exercise the option to sell the property under section 26 of the Mortgage Act after expiry of the time provided for the rectification of the default stipulated in the notice served on him or her under section 19 of the Mortgage Act.

The intended sale having been stopped by agreement of the parties, the question is whether further notice is required. The provisions of the memorandum of understanding gave consequences of default upon failure to fulfil the terms thereof. The monthly amounts to be paid were agreed upon. In the premises I cannot revisit the notices prior to the agreement to stop the sale. The question is whether, after stopping the sale, the mortgagor ought to be given another notice.

The respondent having proceeded under the Mortgage Act and attempted to exercise powers of sale under the Act, they are bound by statutory provisions. Section 26 of the Mortgage Act is mandatory because the notice of sale is not only to be served on the mortgagor but also it shall be served on any spouse or spouses of the mortgagor in respect of the matrimonial home, a surety, the independent person as provided under the Act.

The provisions for giving notice to these other persons are mandatory. Section 26 (3) of the Mortgage Act provides as follows:

“26. Mortgagee’s power of sale.

(1) Where a mortgagor is in default of his or her obligations under a mortgage and remains in default at the expiry of the time provided for the rectification of that default in the notice served on him or her under section 19 (3), a mortgagee may exercise his or her power to sell the mortgaged land.

(2) 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.

(3) A copy of the notice to sell served in accordance with subsection (2) shall be served on—

- (a) a mortgagor;
- (b) any spouse or spouses of the mortgagor in respect of a matrimonial home;
- (c) a surety;
- (d) the independent person as provided under this Act; or
- (e) in case of customary land, the children and the spouse or spouses.”

I have considered the fact that paragraph 7 (f) includes a personal guarantee of Hon. Betty Bigombe Oyella in support of the borrowing. The question is whether she is entitled to notice of sale? The term "surety" is defined by section 2 of the Mortgage Act 2009 to include a person who offered as security in the form of money or money's worth to ensure the payment of any monies secured by a mortgage and includes a guarantor.

In the premises, the question is not whether the respondent is not entitled to sell the property since the applicant expressly acknowledged indebtedness and promised to pay according to a schedule or else have the property sold by the respondent. Secondly the applicant bound himself to have the property sold in the event of default.

The terms of a mortgage may be varied under section 12 of the Act as follows:

“12. Variation of a mortgage.

- (1) The rate of interest payable under a mortgage may be reduced or increased by a notice served on the mortgagor by the mortgagee which shall—
  - (a) give the mortgagor not less than fifteen working days’ written notice of the reduction or increase in the rate of interest;
  - (b) state clearly and in a manner which can be readily understood, the new rate of interest to be paid in respect of the mortgage;
  - (c) state the responsibility of the mortgagor to take such action as he or she is advised by the notice to take to ensure that the new interest rate is paid to the mortgagee.
- (2) The amount secured by a mortgage may be reduced or increased by a memorandum which—
  - (a) complies with subsection (5); and
  - (b) is signed—
    - (i) in the case of a memorandum of reduction, by the mortgagee; or

- (ii) in the case of a memorandum of increase, by the current mortgagor; and
- (c) states that the principal moneys intended to be secured by the mortgage are reduced or increased as the case may be, to the amount or in the manner specified in the memorandum.
- (3) The term or currency of a mortgage may be shortened, extended or renewed by a memorandum which—
  - (a) complies with subsection (5);
  - (b) is signed by the current mortgagor and by the mortgagee; and
  - (c) states that the term or currency of the mortgage is shortened, extended or renewed, as the case may be, to the date or in the manner specified in the memorandum.
- (4) The covenants, conditions and powers expressed or implied in a mortgage may be varied, but not so as to impose any significantly greater burdens on the borrower than those set out in section 17 by a memorandum which—
  - (a) complies with subsection (5);
  - (b) is signed by the current mortgagor and the mortgagee; and
  - (c) states that the covenants, conditions and powers expressed or implied in the mortgage are varied in the manner specified in the memorandum.
- (5) A memorandum for the purposes of subsections (2), (3) and (4)—
  - (a) shall be endorsed on or annexed to the mortgage instrument; and
  - (b) when so endorsed or annexed to the mortgage instrument, operates to vary the mortgage in accordance with the terms of the memorandum.”

Covenants and conditions may be varied by memorandum under section 12 (4) of the Mortgage Act. Finally, in this suit the mortgagor is in default and the parties agreed that the property may be sold if the mortgagor failed to fulfil the terms of the memorandum of understanding. In paragraph 11 of the affidavit in reply, the applicant failed to fulfil the terms of his own undertaking.

The contention of the applicant that he does not know what amount is due cannot stand because what is due and the due days of payment is expressly indicated in the memorandum of understanding and the first applicant acknowledged indebtedness.

In the premises therefore, the applicant's application lacks merit. That notwithstanding a conditional order may in the circumstances be issued because the property has to be re-advertised and notice given to the statutory persons stipulated under the law.

Where an intended sale is stopped or adjourned for more than 14 days it is provided by Regulation 13 (7) of the Mortgage Regulations that a fresh advertisement has to be issued in accordance with regulation 8. Regulation 13 (7) of the Mortgage Regulations 2012 provides as follows:

"(7) Where a sale is adjourned under this regulation for a period longer than 14 days, a fresh public notice shall be given in accordance with regulation 8 unless the mortgagor consents to waive it."

Regulation 8 of the Mortgage Regulations 2012 also provides that a mortgagee exercising a power of sale under the Act shall subject to the Act and Regulations, sell the mortgaged property by public auction and the sale shall not take place before the expiration of 21 working days from the date of service of the notice as specified in section 26 of the Act. Any person who contravenes Regulation 8 commits an offence.

Last but not least I agree with the respondents submissions that 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. Secondly, the principles in two Kenyan cases of **Matex Commercial Supplies Ltd and another vs. Euro Bank Ltd (in liquidation) [2008] 1 EA at PP 216** and **Maithya vs. Housing Finance Company of Kenya and another [2003] 1 EA 133** is that any kind of property offered to a bank as security for a loan is made on the understanding that the property stands the risk of being sold by the lender if there is default on the payment schedule and amounts of repayment of the debt secured.

It is now necessary to re-advertise the property, and have a current valuation of not more than 6 months previous to sale under regulation 11 (2) of the Mortgage Regulations 2012. A limited order will therefore be issued to fulfil the operation of the Mortgage Act and to give notice to the statutory persons entitled to notice as well as enable the Respondent have an updated valuation of the property.

The court directs that the sale will not take place until and unless a fresh statutory notice of sale is issued and the property re-advertised for sale after a valuation of the property less than six months previous to sale is available. The sale shall be notified in the press as prescribed by the Mortgage Regulations 2012 and that gives the Applicant a chance to have his account reconciled and also to stop the intended sale by payment of the deposit prescribed under regulation 13 of the Mortgage Regulation. The applicant may stop the sale or have it redeemed upon payment of the prescribed deposit at any time before the sale of the suit property.

The application succeeds only to secure compliance with the statutory process of sale and the rest of the application stands dismissed.

The costs of this application shall be borne by the applicants.

Ruling delivered in open court on 12<sup>th</sup> April 2017

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**12/04/2017**