

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 143 OF 2017
(ARISING OUT OF CIVIL SUIT NO 140 OF 2017)**

MUGISHA MOSES}.....APPLICANT

VERSUS

FINANCE TRUST BANK LTD}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant applied for a temporary injunction to restrain the Respondent, its employees, agents and/or servants and successors in title from interfering with the land comprised in LRV 3322/14 at Plot Number 21D Rwebushuri, Road Mbarara pending determination of HCCS No. 140 of 2017 and for costs of the application to be provided for.

The grounds of the application are contained in the Chamber Summons as well as the affidavit of the Applicant Mr. Mugisha Moses. It is averred in the Chamber Summons that the Applicant filed HCCS No. 140 of 2017 in this court for orders to release his land title since the notice of attachment and sale is wrongful, he having paid off his loan obligations. Secondly, the Applicant will suffer irreparable injury which may not be adequately compensated by damages if the application is not granted. Thirdly, that it is fair and equitable and in the interest of justice that the application is granted.

In the affidavit in support of the application the Applicant deposed that the attachment of the suit property is wrongful because he has no outstanding loan obligations with the Defendant having paid off his loan obligations according to annexure "B" which indicates the loan status as "paid off". He deposed that the loan the Defendant bases his right to attach the facility was taken by the Applicant's financier in his individual capacity and cannot be used as a basis to attach the Applicant's property since the Applicant did not execute powers of attorney. The Applicant's Financier gave the Defendant his security as land comprised in Kyadondo Block 217 Plot 1326 land at Kiwatule which is what the Defendant should attach and sell. Thirdly, the Respondent had a duty to advise its client Mr Kahangire on the implications of taking an individual loan. The agreement signed between the Applicant and Mr Kahangire was not about using the Applicant's land to borrow money in his individual capacity since the Applicant had been Mr Kahangire's

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driver for 18 years but as a gesture of appreciation. It was wrong for the Respondent to use the notice of sale of the Applicants land since there was no memorandum of understanding or power of attorney to that effect. Had the Applicant intended to give his land as security after he had paid off his loan, he would have executed powers of attorney. The court should in the premises issue declaratory orders and stop the sale pending the hearing and determination of the main suit.

In reply Sulaiman Kikabi the Legal Supervisor of the Respondent bank conversant with the facts deposed to an affidavit in which he states that:

The Applicant's application and affidavits in support are defective, a nullity in law, brought in bad faith and tainted with a lot of falsehoods and should be struck out with costs from the very beginning. The facts are that the Respondent advanced the Applicant in a loan of Uganda shillings 250,000,000/= according to a copy of the Credit Facility Agreement dated 23rd September, 2013 and a supplementary one dated 11th December, 2014. The Applicant failed to effect payments under the term loan pursuant to which the Respondent in the year 2015 initiated recovery measures against the Applicant and issued statutory notices and advertised the property. Before the Respondent sold the Applicant's mortgaged property, the Applicant filed a suit against the Respondent in this court together with two applications for an interim order and another one for a temporary injunction. The interim application was dismissed with costs and later on the suit was withdrawn.

On 22nd June, 2015 by a letter in writing to the Respondent, the Applicant gave permission and consented and granted to one Patrick Osbert Kahangire the suit property to be used as security for his loan application to the Respondent bank. Pursuant to the letter, the said Patrick Kahangire obtained a loan from the Respondent by way of assignment of the Applicant's loan obligations to him to which the Respondent conceded according to the correspondence attached and the Credit Facility Agreement attached. The said Kahangire Patrick failed to pay his loan obligations to the Respondent and the Respondent initiated recovery measures and proceeded to the High Court Land Division and sued the Applicant and the Respondent wherein both filed written statements of defence and counterclaim and the suit has not been heard.

On the basis of advice of his Counsel, he deposed that it is an abuse of court process for the Applicant to file a suit in this court when there is another pending suit on the same facts between the same parties in the Land Division of the High Court according to copies of the plaint and written statements of defence and counterclaim attached.

The Applicant has not shown that the main suit has a likelihood of success or that irreparable injury would be suffered at all. The application was brought in bad faith with the sole purpose of defrauding the Respondent.

At the hearing of the application Counsel Munyaneza Daniel represented the Applicant while Counsels Kagoro Robert Friday and Anne Kalungi represented the Respondent.

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The court was addressed in written submissions. The submissions deal with the principles for the grant of a temporary injunction and address the issue of whether a temporary injunction should be granted.

The Respondent's affidavit in reply deposed to by Sulaiman Kikabi raises a point of law which if upheld bars this court from entertaining any proceedings under this suit.

The Applicant's suit was filed on 22nd February, 2017 while a written statement of defence thereto was filed on 10th March, 2017. It is averred in paragraph 3 of the written statement of defence that the Defendant intends to raise a point of law to the effect that the suit is barred in law and the plaint is defective for disclosing no cause of action, is frivolous, vexatious and an abuse of court process to the extent that there is a pending suit in the High Court Land Division Civil Suit No. 714 of 2016 between the same parties and on the same facts and the suit ought to be struck out or dismissed with costs.

The contention that there is another pending suit between the same parties is repeated in paragraph 10 of the affidavit in reply of Mr Sulaiman Kikabi. He attached to the affidavit in reply annexure "F1, F2 and F3. Annexure F1 is the plaint in Civil Suit No. 714 of 2016 between **Kahangire Patrick Osbert as Plaintiff** and **Finance Trust Bank** and **Mugisha Moses as Defendants**. The cause of action in paragraph 4 against the Defendants jointly and severally is for conspiracy to defraud the Plaintiff, declaratory orders, permanent injunction, general damages and costs of the suit. The basis of this suit is a mortgage facility executed on 22nd December, 2015 for Uganda shillings 460,000,000/=. After the execution of the facility it is averred that the Plaintiff took over the loan of the second Defendant of Uganda shillings 305,840,864/= and therefore took over the charge of the security of the land comprised in LRV 3322/14 Folio 14 Plot 21D Rwebishuri Road Mbarara Municipality, Mbarara District which the Defendant had got from the first Defendant. It is alleged that the second Defendant had failed to complete and had defaulted on his loan obligations. The Plaintiff was led into a wild goose chase and made to use his property in Kiwatule as security to obtain a loan facility to clear the arrears of the second Defendant's loan and complete the structure on the second Defendant's title. A mortgage was created on both titles including that of the Plaintiff through trickery yet the monies given were mandatorily to be used or spent on the structure of the second Defendant's land. Thirdly, the first Defendant opted to foreclose on both titles in Mbarara and Kiwatule yet the facility was properly for purposes of improving the structure on the title still registered in the names of the second Defendant.

In Annexure F2 the first Defendant filed a written statement of defence opposing the suit. In Annexure F3 the second Defendant who is the Plaintiff in this suit also filed a written statement of defence opposing the suit. The first Defendant's written statement of defence was filed on the 22nd November, 2016 while the second Defendant's written statement of defence was filed on 8th November, 2016. In paragraph 5 of the written statement of defence of the second Defendant, the

second Defendant denied that his security was used to secure the second loan granted to the Plaintiff Mr Kahangire Patrick Osbert. It is alleged that the second loan was secured by a title of the Plaintiff (land in Kiwatule). In the suit by way of counterclaim the second Defendant sought an order for the release of the security comprised in the suit property in the current suit.

I have carefully considered the averments and it is my considered decision that the application for a temporary injunction cannot be entertained on the ground of the prohibition of section 6 of the Civil Procedure Act which bars this court from trying a suit on the same facts as a prior instituted suit. Section 6 of the Civil Procedure Act provides as follows:

“6. Stay of suit.

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where that suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in that suit in the foreign court.”

Section 6 of the Civil Procedure Act (supra) is mandatory. It provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties. It is a proven fact that **HCCS No. 714 of 2016** is a prior instituted suit. Secondly, according to paragraph 10 of the affidavit in reply, it is still pending. Thirdly, it is between the same parties and concerns the same subject matter of the loan. In the issue before the High Court in the Land Division the question for trial includes the issue of whether the Plaintiff in that suit took over the loan together with the security of the second Defendant who is the Plaintiff in this suit. In a counterclaim the second Defendant in that suit who is the Plaintiff in this suit seeks an order for his suit property to be released by the Defendant in this suit to him. In other words land comprised in LRV 3322/14 Folio 14 Plot 21D Rwebishuri Road Mbarara Municipality, Mbarara district, is the subject matter of the suit in the prior instituted suit as well as in this suit.

In the premises, section 6 of the Civil Procedure Act bars this court from hearing any proceedings including an application for an interim order or a temporary injunction because there is a prior instituted suit between the same parties and litigating about the same subject matter.

In the premises, **HCCS Number 140 of 2017** together with any miscellaneous applications arising there under inclusive of High Court **Miscellaneous Application Number 143 of 2017** is stayed pending the hearing of **H.C.C.S. No. 714 of 2016 between Kahangire Patrick Osbert as**

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Plaintiff and Finance Trust Bank and Mugisha Moses as Defendants. The costs of all proceedings in this suit thus far shall abide the outcome of **HCCS No 714 of 2016.**

Ruling delivered in open court on 9th May, 2017

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Daniel Munyaneza for the Applicant

Counsel Anne Kalungi for Respondent

Applicant is in court

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

9th May, 2017