

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 319 OF 2017
(ARISING OUT OF CIVIL SUIT NO. 280 OF 2017)**

PARUL BEN BAROT}.....APPLICANT

VERSUS

VICTORIA FINANCE COMPANY LTD}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant filed this application for a temporary injunction citing section 98 of the Civil Procedure Act, cap 71 laws of Uganda, section 33 and 38 (1) of the Judicature Act, cap 13 and Order 41 rules 1, 3 and 9 of the Civil Procedure Rules for a temporary injunction to restrain the Respondent/Defendant, its agents, representatives, nominees or assignees from attaching, selling, transferring, alienating and or interfering with the Applicants legal or physical possession of property comprised in LRV 4208 folio 15, Plot 39, Sadler Way, Kampala on account of an alleged debt and accruing interest the subject of this suit pending disposal of the main suit or until any further orders of this court. It is also for costs of the application to be provided for.

The application is further supported by the affidavit of Ms Parul Ben Barot. The grounds of the application as disclosed in the Chamber Summons are as follows:

1. The Applicant is the lawful owner of land and developments comprised in LRV 4208 folio 15, Plot 39, Sadler Way, Kampala.
2. There is a civil suit against the Respondent by the Applicant that is pending disposal in this court.
3. The dispute between the Applicant and the Respondent as espoused in the main suit is in regard to the Applicants prayers for:
 - a. A declaration that the Respondent/Defendant is in breach of contract, breach of statutory obligation and a breach of duty.
 - b. A declaration that the Applicant/Plaintiff does not owe the Respondent/Defendant the amount claimed in the Defendant's notice of sale of mortgaged property.
 - c. A declaration that the interest rate and penalties being charged by the Respondent/Defendant is unconscionable and unlawful.

- d. An order for a permanent injunction restraining the Respondent/Defendant, its agents, representatives, nominees or assignees from attaching, selling, transferring, alienating and or interfering with the Applicant/Plaintiff's legal or physical possession of the property comprised in LRV 4208 folio 15, plot 39, Sadler Way, Kampala on account of an alleged debt and accruing interest.
 - e. An order that the Respondent/Defendant pays the Applicant/Plaintiff Uganda shillings 2,400,000/= as provided for in section 4 (2) of the Mortgage Act number 8 of 2009.
 - f. An order that the Respondent/Defendant pays US\$40,000 being the money it unlawfully deducted from the said credit facility.
 - g. General damages for breach of contract, breach of statutory obligation and breach of duty.
 - h. Interests on (U) and (F) at commercial rate from the date of breach till payment in full.
 - i. Interest on (g) above at court rate from the date of judgment till payment in full.
 - j. Costs of this suit.
 - k. Any other alternative relief as the court shall deem proper or and just.
4. The Respondent/Defendant's notice of sale of mortgaged property written on 4th of April 2017 and addressed to the Applicant/Plaintiff, indicates that there was an amount of Uganda shillings 2,171,603,818/= which is allegedly due, owing and outstanding and yet the Respondent/Defendant has failed or refused to avail the Applicant/Plaintiff an account of the loan facility.
 5. The Respondent/Defendant has refused or failed to avail the Applicant/Plaintiff an account of the amounts that are being charged as interest and penalties charges.
 6. In view of the above, there is disparity on the interest and other charges that continued to accumulate to which penalty interest, interest repayment, interest made due, principal made due, credit arrangement, overdue interest and late fee charges being imposed on the Applicant which the Respondent seeks to recover.
 7. It is inequitable, unconscionable, and or illegal for the Respondent to impose on the Applicant such interest and charges as demanded by the Respondent.
 8. The Applicant has at all times honoured her contractual obligations by or is effecting payment of such amounts due despite challenges from the Respondents conduct complained of.
 9. The Respondent is given notice to sell the Applicants property comprised in LRV 4208 folio 15, plots 39 Sadler Way, Kampala on account of an alleged debt and accruing interest stated in the Respondents notice of sale of mortgaged property.
 10. The Applicant maintains legal interests in respect of the said property and remains entitled to them as of right.

11. Unless the Respondent is temporarily restrained, it will sell or transfer or alienate the Applicant's property on account of an alleged debt and accruing interest the subject matter of this suit which will greatly prejudice the Applicant and cause financial loss that cannot be atoned for by way of damages.
12. The orders of the said civil suit shall be rendered nugatory if the properties are disposed of.
13. The Applicant's suit has established a prima facie case against the Respondent and it is premised on the Respondent's breach of contract, breach of statutory obligation and breach of duty in respect of the loan facility advanced to the Applicant.
14. There is a need for this honourable court to exercise its judicial discretion of preserving the status quo by granting the application for a temporary injunction until questions for determination in the substantive suit have been disposed off.
15. There are serious questions to be tried as there is material evidence available to the court disclosing that the Applicant has a real prospect of succeeding in this claim for a temporary injunction at the trial.
16. The Applicant is in possession of the suit property.
17. The balance of convenience is in the Applicants favour as she is about to lose her constitutionally guaranteed right and ownership of the property against the Respondent who can always await the outcome of the court investigation and resume its recovery actions if it is found out in its favour.
18. Lastly that it is in the interests of justice that the application is allowed.

The grounds of the application are further contained in the affidavit of Parul Ben Barot, a female adult Indian of sound mind and the Applicant. In addition to the grounds contained in the chamber summons, she deposes as follows:

The Applicant is the lawful owner of the land and developments referred to in the application (the suit property). The dispute between the parties is disclosed in the main suit as also averred in the chamber summons and need not be repeated here. Sometime in June 2016 she entered into an agreement with the Respondent/Defendant wherein the Respondent/Defendant agreed to make available a credit facility of US\$400,000 on the Respondents/Defendants terms. The contents of the agreement were reduced in writing by the Respondent/Defendant but retained by the Respondent/Defendant and no one ever translated to her to comprehend and appreciate. Following the decision of the agreement leading to the loan facilitation, she was told that the money was to be repaid within a period of 12 months. The loan facility was secured by her property comprised in LRV 4208 Folio 15, Plot 39 Sadler Way, Kampala. The Respondent/Defendant subsequently advanced/availed the facilities specified in the plaint less US\$81,000 as alleged charges for procuring the credit facility contrary to the terms of the agreement. She was never informed of the deduction which subsequently had adverse effect of reducing on the amount that she indeed borrowed from the Respondent/Defendant. Thereafter

she made several payments with regard to the credit facility which payments were all channelled or effected to the Respondent/Defendant. The Respondent/Defendant at all times during the payments refused to avail the statement of accounts reflecting the amounts due if any. Furthermore the Respondent/Defendant at all times during the payments refused to avail her receipts of acknowledgement.

She further deposes that contrary to statutory obligations and in breach of a duty of care, the Respondent/Defendant failed, neglected to reflect several payments in respect of the credit facility according to section 4 (1) (b) of the Mortgage Act 2009 and is liable to pay Uganda shillings 2,400,000/= to the Applicant. In further breach of the contract and the statutory or legal obligations of the Respondent to its customer, the Respondent failed to credit payments in respect of the credit facility and as a consequence is irregularly charging and claiming penal interest and other charges in respect thereof amounting to Uganda shillings 2,171,603,818/= according to the notice of sale of the mortgaged property. The penalties and interest charged and claimed in respect of the loan facility are unreasonable and unconscionable. The Respondent refused to avail an account of the amounts that had been charged as interest and penal charges.

She deposed that she honoured her contractual obligations by always effecting payment of such amounts due despite challenges from the Respondent's conduct complained about. She has so far paid the Defendant money amounting to 350,000 us dollars in respect of the loan facility. The Respondent gave notice of sale of property on account of an alleged debt and accruing interest according to the details in the notice of sale. The actions of the Respondent shortly deliberate intent to unlawfully deprive the Applicant of the property through dishonest and fraudulent means. No statutory notice of default has been issued as required by the law. The Respondent failed to avail account regarding the loan obligations of the Applicant.

The orders sought in this suit will be rendered nugatory if the properties are disposed off. Secondly, the intended sale will cause irreparable damage to the Applicant. Thirdly, the Applicant is in possession of the suit property and the balance of convenience is in favour of granting the application pending the outcome of court investigation.

In reply Sehab Charania, a director of the Respondent Company who read the application and sought advice of his lawyers deposed as follows:

The Applicant's application is tainted with falsehoods, is misconceived, argumentative in nature with no merit and intended to mislead this court. On 14th July, 2016 the Applicant applied for a loan facility of Uganda shillings 1,522,500,000/= repayable within a period of six months and further proposed her certificate of title as security for the borrowing. On 21st July, 2016 the Respondent Company agreed to amend the requested amount at the agreed interest rate of 2% per month payable within a period of six months and secured by the Applicants property described in the application. The loan was secured by a mortgage of the land and properly

registered on 11th August, 2016 Instrument No. KCCA0030778. The Respondent has never refused to avail the Applicant a copy of her statement and she is aware that from the time when the funds were disbursed to her and duly acknowledged, she has made only two payments towards the loan facility. The total sum paid is Uganda shillings 105,000,000/= within a period of nine months when the loan ought to have been fully paid.

The Applicant is indeed indebted to the Respondent company in the sum of Uganda shillings 2,171,603,818/= by 31st of March, 2017 with interest continuing to accrue at the agreed rate of 2% per annum without any penalties as alleged by the Applicant. The original disparity in interest charged as it was agreed upon at the rate of 2% and no penalty interest has been applied as alleged. That is not unconscionable interest and the Respondent has to repay the sums lent out to its bankers with interest.

Following the Applicant's default, the Respondent Company made several demands on the Applicant to regularise the account and notified her of the consequences of default if she failed to settle the amounts due and owing to the Respondent but she chose to decline receipt of the demands hence they were sent by registered mail. That is not dishonesty on the part of the Respondent but rather the Applicant's application is tainted with falsehoods in terms of currency stated in United States dollars instead of Uganda shillings. The loan amount issued to the Applicant was in Uganda shillings. And was not less by US\$40,000 as alleged and the payments made were in Uganda shillings. The repayment period was six months and not 12 months as alleged.

The Applicant suit is devoid of merit as it is based on an action for recovery of the mortgaged property and a permanent injunction to which the Applicant has not repaid the sums borrowed which continues to accrue interest at the agreed rate. The Applicant would suffer no loss that cannot be atoned for in damages in the unlikely event that she is successful in the main suit.

On the ground of advise of the company lawyers, he deposes that before the temporary injunction order can be granted, the Applicant should comply with regulation 13 (2) of the Mortgage Regulations Number 02 of 2012 by paying 30% of the forced sale value of the mortgaged property or 30% of the outstanding amount which translates to Uganda shillings 651,480,000/=. Furthermore, there are no serious questions for trial as the Applicant is indebted and the application and the suit is frivolous and intended to delay the Respondent from recovering the funds lent to the Applicant which she has since refused to repay under the protection of the court to the detriment of the Respondent lawfully enforcing the rights of the mortgagee to recover funds that are due and owing. Furthermore, the balance of convenience is in favour of the Respondent as the amount being continuously held by the Applicant is a huge amount of Uganda shillings 2,171,603,818/= costing the Respondents business and income as a company providing financial services.

Furthermore as advised by the Respondents lawyers, the application was brought in bad faith, is an abuse of the court process and is meant to delay payments due and owing to the Respondent company arising from an agreement to borrow money secured by a mortgage on the suit property when the Applicant has not paid and is in arrears by fourth of April 2017 with interest continuing to accrue. In the unlikely event that the court exercises its discretion as it deems fit to grant a temporary injunction stopping the sale of the mortgaged property, the Applicant should be ordered to pay 30% of the amounts due and owing to the Respondent.

The Applicant deposed to an affidavit in rejoinder in which she states as follows: She read and understood the contents of the affidavit in reply of Sehab Charania. She denies the contents of the affidavit in reply and stated that contrary to what is contained in the said affidavit, she entered into an agreement with the Respondent for it to make available to her a sum of US\$400,000 to be repaid within the period of 12 months. The contents of the agreement were reduced into writing and retained by the Respondent and were never transmitted to her to comprehend and appreciate the terms thereof. There is a disparity on the interest and penalties being imposed by the Respondent on the Applicant which are legally unconscionable and which the court ought to investigate. The Respondent's written statement of defence contains cogent evidence and addressed the fact that the Respondent is in breach of contract, breach of a statutory obligation and duty and unlawfully made excessive deduction on the credit facility so advanced to the Plaintiff. From annexure "C" of the written statement of defence of the Respondent, it is clear that the amount to be recovered after six months is Uganda shillings 1, 705,200,000/=. The amount in annexure "C" greatly conflicts with the amount in annexure "G" of the written statement of defence which cheques are equal to Uganda shillings 2,012,250,000/=. Inasmuch as the amounts greatly vary by a difference of Uganda shillings 307,050,000/=. It is strange that at the time of executing the agreement, cheques in excess of Uganda shillings 307,050,000/= were purportedly issued by the Applicant. It is also strained that they were issued and dated 21st of April 2017 to 24th of April 2017 when the loan according to the Defendant's documents was to be for only six months from July 2016 to January 2017. It is further strange that the cheques were presented for banking five days after she challenged the legality of the actions of the Respondent. The Respondent has acted maliciously, dishonestly and fraudulently with regard to the credit facility. The Respondent frustrated its agreement with the Applicant by disbursing funds in a manner inconsistent with the commercial representation made to her by further withholding a substantial sum of the amount of the loan facility. The Respondent arbitrarily charged interest under facility amount at the rate not agreed upon and on amounts not disbursed to perpetually keep the Applicant indebted to it. She was never availed documents attendant to the undertaking by the Respondent and the outstanding sum is contested. She made several payments amounting to US\$350,000 with regard to the credit facility but the Applicant refused to avail her receipts of acknowledgement. In the premises, she reiterated the contents of her affidavit in support of the application.

The Applicant is represented by Counsel Johnny Patrick Barenzi while the Respondent is represented by Counsel Kenneth Akampurira. The court was subsequently addressed in written submissions.

On 7th June, 2017 the court received a letter dated 7th June, 2017 from Barenzi & Company Advocates attaching an acknowledgement of US\$12,000 on behalf of the Respondent/Defendant pursuant to the order of the court dated 31st of May 2017.

The Applicant's case in brief is that sometime in June 2016 she entered into an agreement with the Respondent wherein the Respondent agreed to make available to her US\$400,000 on the Respondent's terms. The contents of the agreement were reduced into writing by the Respondent but retained by the later and never translated for the Applicant to comprehend and appreciate the terms and conditions therein. The Applicant was told that money was to be paid within a period of 12 months with the loan facility secured by property comprised in LRV 4208 folio 15 plot 39 Sadler Way, Kampala (the suit property). The Respondent subsequently advanced the Applicant facilities specified in the plaint less US\$40,000. The Applicant was not informed of the deduction which subsequently had an adverse effect of reducing the amount the Applicant indeed borrowed from the Respondent. The Applicant thereafter made several payments amounting to US\$530,000 which payments were all channelled or effected to the Respondent. The Respondent at all times during the payments that were being made by the Applicant refused to avail the Applicant the statement of account reflecting the amounts due if any. The Respondent at all times during the payments that were made by the Applicant refused to avail the Applicant receipts of acknowledgement in respect of the said payments. Subsequently the Respondent threatened to sell the Applicants property (the suit property) on account of an alleged debt and accruing interest according to the notice of sale of mortgaged property.

The Applicant's Counsel submitted that according to the Respondent's written statement of defence and annexure H1, H2, H3 and H4 thereof, it is unequivocally that there is a disparity on the interest and penalties imposed by the Respondent on the Applicant which are legally unconscionable and which this honourable court ought to investigate. The contents of annexure "C" to WSD demonstrate that the Respondent made excessive deductions on the credit facility so advanced to the Applicant. The contents of annexure "C" are inconsistent and not in conformity with the applicable laws regarding money lending, are unconscionable and unlawful. In it, it is alleged the outstanding amount is to be recovered after six months and is Uganda shillings 1,705,200,000/= . The amount in annexure "C" greatly conflicts with annexure "G" of the written statement of defence of the Defendant which cheques title to Uganda shillings 2,012,250,000/= . Counsel submitted that it is strange that at the time of executing the agreement, cheques in excess of Uganda shillings 307,050,000/= of what was to be paid were purportedly issued by the Applicant. It is strange that Annexure "G" cheques were issued and dated 21st April, 2017 to 24th April, 2017 and the loan according to the Respondent's pleadings was to be for a period of six months with effect from July 2016 up to January 2017.

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Counsel submitted that it was strange that the cheques were presented for banking five days after the Applicant had challenged the legality of the actions of the Respondent. Furthermore annexure "F" of the written statement of defence compared to annexure H1 demonstrates that the demand of the Respondent was in excess of what was to be recovered for four months and was in excess of what was to be recovered even after six months.

In the premises, the Applicants Counsel contended that the Respondent had acted maliciously, dishonestly and fraudulently with respect to the credit facility by frustrating its agreement with the Applicant by disbursing funds in a manner inconsistent with the commercial presentation made by the Applicant and by withholding a substantial sum of the amount of the loan facility. The Respondent in an intentional perversion of truth for the purpose of inducing the Applicant to rely upon it to part with the property, arbitrarily charged interest on the facility amount at a rate not agreed upon and on amounts not disbursed to perpetually keep the Applicant indebted. The alleged debt is strongly disputed and the issue of the Applicant's alleged indebtedness is a matter of fact that ought to be tried in the main suit.

The civil suit has a high likelihood of success. Secondly the order sought in the civil suit is likely to be rendered nugatory if the property is disposed off. He prayed that the honourable court protects the right of the Applicant to have the suit determined on the merits. The property was likely to be attached on the ground of an alleged debt which is in dispute. Sale of the Applicants property unless stopped would cause irreparable damage to the Applicant who has sentimental attachment to the property. He relied on the case of **Shiv Construction Company Ltd vs. Endesha Enterprises Ltd Civil Appeal No. 34** of 1992 where it was held that that in disputes involving land, damages are not usually sufficient compensation. He further submitted that there are serious questions to be tried and that is material evidence available disclosing that the Applicant has a real prospect of succeeding in that claims for a permanent injunction at the trial. The Applicant is in possession of the suit property and the remedy sought is a temporary one. Furthermore the balance of convenience is in the Applicants favour as he is about to lose her constitutionally guaranteed right to ownership of the property against the Respondent who can always await the outcome of the court investigation and resume its actions if the suit is founded in its favour. The Applicants Counsel prayed that the court is guided by the Court of Appeal case of **Grace Bamurangye Bororoza & 53 Others vs. Dr. Kasirivu Atwoki & 5 Others, Civil Application No. 44 of 2008** arising from **Civil Appeal No. 45 of 2008 and High Court Civil Application No. 347 of 2007**. In similar circumstances, the Applicant was granted a temporary injunction.

Regarding the Respondents argument that the Applicant should comply with Regulation 13 (2) of the Mortgage Regulations No. 2 of 2012 by paying 30% of the forced sale value of the mortgaged property or 30% of the outstanding amount, the Applicant contends that the Respondent has not disclosed the forced sale value of the suit property. The Applicant further contends that the outstanding amount is strongly disputed. The mortgage itself is riddled with *Decision of Hon. Mr. Justice Christopher Madrama Izama* *^*~ *&*\$\$# xtra+ *maximum735securityx 2017 style*

illegalities which have been brought to the attention of the court. Enforcing the Respondents request would put them on to sanctioning the illegalities. He relied on the Supreme Court case of **Margaret Kato and Joel Kato vs. Nuulu Nalwoga Civil Miscellaneous Application No. 11 of 2011** where the Applicant were required to deposit security for due performance of the decree as required by the law. The Supreme Court however, held that the interests of justice would better be served if the status quo was maintained as opposed to ordering the Applicants to deposit a substantial amount of money as security for due performance of the decree. He contended that in this particular case, the interest of justice is better served if the status quo is maintained as opposed to the court ordering the Applicant to deposit 30%.

Counsel further relied on the case of **Amrit Goyal vs. Harichand Goyal and others HCMA No. 438 of 2001 arising from Civil Suit No. 432 of 2001** for the proposition that where an Applicant raises issues both of fact and law and mixed fact and law, the issues deserve to be heard on the merits. Secondly, Counsel submitted that this is an interlocutory stage and the court is not called upon to decide with finality on the controversies disclosed. The court further has an obligation to guide its orders from being rendered nugatory.

In reply, the Respondent's Counsel opposed the application for a temporary injunction.

He submitted that the Applicant's application had been brought under section 98 of the Civil Procedure Act, section 33 and 38 (1) of the Judicature Act and Order 41 rules 1, 3 and 9 of the Civil Procedure Rules. He contended that the application was brought under the wrong law and should have been brought under the Mortgage Act 2009. The Respondents Counsel further submitted that his contention is based on the wrong title of the Mortgage Act 2012 which provides for the spirit under which the Act is promulgated. The preamble inter alia provides for suits by mortgagors, the remedies of mortgagors and mortgagees and for the power of court in respect of mortgages and related matters. The Respondents Counsel further relied on the decision of this court in **Willis International Engineering Contractors Ltd & Another vs. DFCU bank Miscellaneous Application No 1000 2015** and the case of **Agnes Katushabe vs. Housing Finance Bank & another Miscellaneous Application No. 134 of 2015** by Honourable Lady Justice Eva Luswata. (See also the case of **Paunocks Enterprises Ltd & Others vs. Stanbic Bank (U) Ltd.**) The authorities are to the effect that the jurisdiction of the High Court should be exercised in conformity with the written law which is the Mortgage Act and Regulations made there under and not the traditional grounds for granting an injunction. On that basis he prayed that the application is dismissed for being misconceived because it was brought under the wrong law.

On the second ground he prayed that the Applicant should be ordered to pay 30% of the outstanding amount or 30% of the forced sale value of the mortgaged property prior to the grant of a temporary injunction in accordance with the law.

He submitted that before the court can entertain the Applicant to grant a temporary relief such as an injunction which has the effect of stopping the sale of the mortgaged property, the Applicant must comply with the statutory remedies available to a mortgagor who wants to stop or postpone a sale under regulation 13 of the mortgage regulations. The regulation requires the deposit of 30% of the outstanding amount or in the alternative 30% of the forced sale value of the mortgaged property. Non-compliance entitles the Respondent to continue with the disposal of the mortgaged property premised on the fact that the loss can be atoned for by way of damages since it can be quantified from the value of the property in the event that the Applicant is successful in the main suit.

Furthermore the Respondents Counsel submitted that from the pleadings filed by the Applicant, there is no annexure attached to demonstrate that the Applicant gave any notice of intended action prior to filing the main suit and the application for a temporary injunction to this honourable court. In the premises, the suit and the application were prematurely brought before the court and the Applicant's application should be dismissed with costs for non-compliance with the regulation 13 of the Mortgage Regulations. He contended that the regulation provides a remedy for any mortgagor or party intending to adjourn the sale of mortgaged property by the payment of 30% as earlier submitted.

With reference to the contention of the Applicant that she was not served with the statutory notices of the notice of sale of mortgaged property, Counsel relies on annexure "E" which is a statutory notice of sale of mortgaged property dated 4th April, 2017. The Applicant was served with the notice of sale and to take place only after 21 days if the amount outstanding and related costs are not paid.

The Respondents Counsel further submitted that the Applicant alleged having borrowed US\$400,000 and paid back US\$350,000. However, the Applicant has not furnished any documentation to demonstrate to the court that the loan was disbursed in the US dollars nor is there any evidence of payment. She made unfounded allegations of payments totalling to US\$350,000. On the other hand the Respondent has demonstrated that a loan of Uganda shillings 1,552,500,000/= was disbursed and duly acknowledged by the Applicant in the loan agreement and the payment voucher is annexed in the affidavit in reply. Furthermore the Applicant alleged that the amount outstanding as demanded by the Respondent is inclusive of penal interest which the Respondent is not entitled to charge and the correct interest ought to be 2% per month for 12 months. Counsel submitted that the loan agreement provides that the loan period was for six months and not 12 months and the rate of 2% per month continuing to accrue interest for a period in excess of six months as provided for in clause 2 and 5 of the agreement. The Applicant received the loan amount on 27th July, 2016 and since held that the Applicants funds for a period of 10 months.

Since the disbursement the Applicant only paid two instalments of Uganda shillings 35,000,000/= and Uganda shillings 70,000,000/= making a total of Uganda shillings 105,000,000/= towards reducing the indebtedness.

Alternatively the Respondents Counsel submitted that if the court took the Applicants unfounded allegations of unconscionable interest, the Applicant is indebted with regard to the principal sum claimed in the amount of Uganda shillings 1,522,500,000/=. If interest is charged at 2% per month it translates into Uganda shillings 304,500,000/= making a total of Uganda shillings 1,827,000,000/= less the amount paid would be Uganda shillings 1,722,000,000/= as the outstanding amount.

Even if the Applicant's calculations are applied, she is liable to pay 30% of the outstanding amount which will translate into Uganda shillings 516,600,000/= or 30% of the forced sale value which can be determined by carrying out a valuation of the mortgaged property if the amount is still disputed by the Applicant. He contended that the court should not be granted temporary injunction without compliance with Regulation 13 of the Mortgage Regulations 2012.

In conclusion, the Respondents Counsel submitted that the Applicant cannot be granted the temporary relief by reason that she is in breach of the order of the court issued on 24th May, 2017 to deposit US\$12,000 within 10 days from 24th May, 2017. The 10 days elapsed on 2nd June, 2017 when the Applicant had not deposited the amount as ordered by the court and therefore she is not entitled to any equitable remedy or statutory remedy such as the stoppage of the sale for being in contempt of court orders. In the premises he prayed that the application fails. In the alternative Counsel prayed that the Applicant deposits Uganda shillings 516,600,000/= or 30% of the forced sale value which can be determined by carrying out a valuation of the mortgaged property.

Ruling

I have carefully considered the Applicants application as well as the Respondents reply together with the affidavit evidence and the documents attached. I have also considered the written submissions of Counsel. The primary reply of the Respondent's Counsel to the Applicant's application is that it is incompetent on two grounds which are of a preliminary nature.

The first ground is that the Applicant moved under the wrong law namely, section 98 of the Civil Procedure Act, sections 33 and 38 (1) of the Judicature Act, and Order 41 rules 1, 3 and 9 of the Civil Procedure Rules. From those premises, the Respondent's Counsel submitted that the Applicant ought to have moved under the Mortgage Act 2009. He submitted that the application was incompetent on that ground and should fail.

The second ground is that the Applicant ought to have deposited 30% of the outstanding amount or of the forced sale value under regulation 13 of the Mortgage Regulations 2012. It is a contention that failure to deposit 30% renders the application incompetent.

I have carefully considered the Respondents contentions and I agree with the submissions that an application to court in respect of remedies sought by a mortgagor or mortgagee is brought under the legal regime of the Mortgage Act 2009. I also agree that a specific law was enacted to deal with the remedies of mortgagors and mortgagees in respect of mortgages and for the power of court in respect of mortgages as stipulated in the preamble to the Mortgage Act, 2009, Act 8. The last part of the preamble to the Mortgage Act 2009 is emphasised and the preamble reads as follows:

“An Act to consolidate the law relating to mortgages; to repeal and replace the Mortgage Act; to provide for the creation of mortgages; for the duties of mortgagors and mortgagees regarding mortgages; for mortgages of matrimonial homes; to make mortgages take effect only as security; to provide for priority, tacking, consolidation and variation of mortgages; *to provide for suits by mortgagors; the discharge of mortgages; covenants, conditions implied in every mortgage; the remedies of mortgagors and mortgagees in respect of mortgages; for the power of court in respect of mortgages; and for related matters.*” (Emphasis added)

The Applicant is a mortgagor and is deemed to have filed the action as enabled by the Mortgage Act 2009. Specifically, the Mortgage Act under section 33 thereof provides that an application for relief against the exercise by the mortgagee of the remedies referred to in section 20 may be made by the mortgagor. It further provides under section 33 (3) that an application for relief may be made at any time after service of the notice under sections 19, sections 22 (2) section 23 (2) or section 24 (1) or section 26 (2) or during the exercise of any of the remedies referred to in those sections. A notice of sale is issued under section 26 of the Mortgage Act after compliance with the notice of default under section 19 (3) for sale of the mortgaged property. The Applicant has indeed filed the plaint in this court against the exercise by the mortgagee, who is the Defendant, of the power of sale and is seeking declarations that it does not owe the Plaintiff the amount in the Defendant’s notice of sale of mortgaged property. This suit therefore falls within those actions envisaged by the Mortgage Act 2009. There is no need for the Plaintiff to cite any provision of the Mortgage Act when lodging a plaint for relief as envisaged in the Act. Failure to cite any relevant provision of the Mortgage Act is not fatal. Neither is it necessary to cite the law in the body of the plaint. So long as the substance of the relief sought is that which is envisaged by the Act, failure to cite the law in the body of the plaint is not a material consideration in dealing with the merits of the suit or any application for relief. What is even more precise and to the point is that the Plaintiff cited the Mortgage Act as one of the laws relied upon in the plaint in the list of authorities as required by Order 5 rule 2 of the Civil Procedure Rules and Order 6 rule 2 of the Civil Procedure Rules.

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Similarly, the Applicant's application for a temporary injunction cites in the list of authorities given, the Mortgage Act, No. 8 of 2009 as one of the laws to be relied upon. The contention that the application was brought under the wrong law has no merit and being a preliminary point of law, is overruled.

The second contention is that the Applicant ought to have deposited 30% of the outstanding loan amount. I have carefully considered the contention; the Applicant claims that out of US\$400,000, she paid US\$350,000. On the other hand the Respondent claims that the money was disbursed in Uganda shillings and the loan facility according to the agreement attached as annexure "A" to the affidavit in reply is Uganda shillings 1,522,500,000/= and the Applicant only paid back Uganda shillings 105,000,000/=. This contention is supported by documentary evidence namely annexure "A" which is a loan application form signed by the Applicant. Secondly, annexure "B" dated 21st July, 2016 being an agreement between the parties giving the loan amount and duly executed by the Applicant. It is agreed that the loan would be secured by a mortgage on Plot 39 Sandler Way, Kampala city.

The Applicant contends that she did not understand the contents of the documents that she signed. Secondly that the interest rates charged were unconscionable. Thirdly, she had paid back US\$350,000. Her affidavit in support of the application is a translated document in the sense that it was read back to her before she signed.

The Applicant makes other allegations in the application. She seeks a remedy of a refund of US\$40,000 as wrongly deducted by the Respondent. She further claims that the Respondent refused to avail her receipts of payment. She contends that failure to reflect payments is an offence under section 4 (1) (b) of the Mortgage Act. The section inter alia provides that the mortgagee and the mortgagor shall act honestly and in good faith and disclose all relevant information relating to the mortgage. A mortgagee or mortgagor who refuses, or neglects or fails to disclose information relevant to a mortgage and which is in his or her possession commits an offence and is liable on conviction to a fine of not less than 48 currency points but not exceeding 120 currency points or imprisonment of not less than 24 months but not exceeding sixty months or both.

I will look at the contention that the interest rate charged is unconscionable. I have also considered the contention that there were unlawful charges in the loan agreement. The Applicant has no documentary proof of the payments she claims to have made because she contends that she was never given any receipt. Her evidence is that the transaction amounts are in dollars while the Plaintiff's evidence is that the transaction amounts are in Uganda shillings.

As far as the contention is concerned, failure to reflect payments is a question of fact that can only be proved through adducing evidence of payment and showing that it was not reflected in the accounts relating to the loan transaction. The Applicant alleges the charging of unlawful

penalties and interests which are unconscionable and I have accordingly considered annexure "D" to the affidavit in reply which the Applicant's loan account statement is for a period of six months. The agreement between the Applicant and the Respondent dated 21st of July 2016 is attached to the affidavit in reply as annexure "B". On the face of the document clause 1 of the agreement provides that the lender agreed to lend or to advance to the borrower a sum of Uganda shillings 1,522,500,000/=. In clause 2 it is provided that the borrower shall pay interest on the loan rate at the rate of 2% per month irrespective of whether the loan is paid before the expiration of six months. In clause 3 it is provided that the borrower agreed to charge other charges such as arrangement fee of Uganda shillings 91,350,000/=:, commitment fee of Uganda shillings 91,350,000/=: and legal charges of Uganda shillings 91,350,000/=: for registration of the mortgage and other loan documents. In clause 5 it is provided that should the borrower fail to pay within the period of six months as provided in clause 4, the other charges stated in paragraphs 2 and 3 of the agreement on due dates, interest and other charges shall continue to accrue plus a penalty fee of 5% per month from the date of the default until payment is made in full.

I have accordingly examined the accounts of the Respondent with regard to the Applicant's loan transaction annexure "D" and the following are my conclusions.

- As noted above the loan amount is Uganda shillings 1,522,500,000/=:.
- In item 1 the Respondent charged interest for 11 days being for the period 21st July, 2016 to 31st July, 2016 of Uganda shillings 27,912,500/=: which amounts to Uganda shillings 2,537,500 per day. In 30 days that interest would be Uganda shillings 76,125,000/=: which far exceeds the agreed interest of 2% per month written in the loan agreement.
- An interest of 2% per month on the loan amount of Uganda shillings 1,522,500,000/=: gives a monthly instalment of Uganda shillings 30,450,000/=:.
- In item 2 the Respondent charged interest for 21 days being the period between 1st August, 2016 to 21st August, 2016. The amount charged is Uganda shillings 54,264,438/=:.
- In the third item the Respondent charged interest for 10 days being the period between 22nd August, 2016 to 31st August, 2016. The two periods amounts to 31 days and the total amount charged is Uganda shillings 81,009,054/=:.
- This far exceeded the monthly interest of 2% of Uganda shillings 30,450,000/=:.
- I have also considered the loan agreement itself in which there are three charges of Uganda shillings 91,350,000/=: under clause 3 thereof giving a total of Uganda shillings 274,050,000/=:.

The various controversies in the affidavit in support and in the reply to the application need to be dealt with on the merits. The above facts indicate that the Applicant has raised a serious question as to whether the conduct of the loan affairs of the Applicant by the Respondent is unlawful under the Mortgage Act and the laws of Uganda. The contentions of the Applicant need to be further investigated and cannot be decided on the merits at this stage of the proceedings.

Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$\$# xtra+
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I agree with the Respondent's Counsel that there has to be compliance with the Mortgage Act in an application for a temporary injunction. This is supported by a series of decisions of the High Court and the Court of Appeal. In the **Willis International Engineering and Contractors Ltd and Another vs. DFCU Bank High Court Miscellaneous Application No. 1000 of 2015** where there ground for stoppage of sale on proving reasonable cause under Regulation 13 of the Mortgage Regulations was considered as follows:

“What is a reasonable cause for the stoppage or adjournment of the sale has not been defined. However the provision supports a suit for relief from the exercise of remedies of a Mortgagee upon default of a Mortgagor under section 20 of the Mortgage Act which remedies include sale of the mortgaged property. I do not have to consider the other remedies as it suffices to deal with the circumstances of the Applicant where the Mortgagee is seeking to sell the property. Wherever there is a suit for relief, there is a reasonable cause as a mortgage does not operate as a transfer of property but as security for borrowing. Regulation 13 (1) provides that the Court may stop the sale upon the payment of 30% of the forced sale value of the mortgaged property or outstanding amount. This rule was considered by the Court of Appeal of Uganda in **Ganafa Peter Kisawuzi vs. DFCU Bank Ltd Civil Application No. 0064 of 2016 arising from Civil Appeal No. 54 of 2016**. The Court of Appeal refused to grant an order of a temporary injunction to the Applicant holding that the remedy was not available to him on the ground that the Applicant had not complied with regulation 13 (1) of the Mortgage Regulations 2012 which required him to deposit 30% of the forced sale value of the mortgaged property or the outstanding amount before stoppage of sale.”

In the case of **Paunocks Enterprises Ltd & Ors vs. Stanbic Bank (U) Ltd H.C.M.A. No. 1113 of 2014** decided in January 2016, this court held that applications for a temporary injunction has to be dealt with in conformity with the statutory provisions for Mortgages under the Mortgage Act, 2009 and Regulations as follows:

“With the promulgation of the Mortgage Act, Act 8 of 2009 as well as the Mortgage Regulations 2012, the jurisdiction for the grant of temporary injunctions in cases where the Mortgagee is trying to sell the mortgaged property has got to be exercised in conformity with the Mortgage Act 2009 as well as the Mortgage Regulations 2012 which have specific directions as to how the intended sale of the mortgaged property is to be stopped or adjourned. The jurisdiction of the High Court under section 38 of the Judicature Act can only be exercised and be subject to the Mortgage Regulations 2012 which prescribe how to have stopped or adjourned an intended sale by a Mortgagee or person authorised to sell the mortgaged property. In the premises the traditional considerations for the grant of a temporary injunction to restrain the sale of mortgaged property have limited application. If they are to apply at all, they are applicable when in accord and not in conflict with the written law.”

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$# xtra+ maxImum735securityx 2017 style*

Finally I have considered the Mortgage Regulations 2012. With due regard to the submission of the Respondent that the property of the Applicant may as well be valued to establish the forced sale value of the property, this submission disregards the requirement that the property has to be valued less than six months prior to sale of the mortgaged property by the mortgagor under the regulations. The Respondents Counsel prayed inter alia that the property should be valued and the 30% of the forced sale value of the property established before grant of a temporary injunction if the court is inclined and if it doesn't should apply 30% of the outstanding amount.

Regulation 13 expressly provides as follows:

“13. Adjournment or stoppage of sale.

(1) The court may on the application of the mortgagor, spouse, agent of the mortgagor or any other interested party and for reasonable cause, adjourn a sale by public auction to a specified date and time upon payment of a security deposit of 30% of the forced sale value of the mortgaged property or outstanding amount.

(6) Notwithstanding sub-regulation (1) where the application is by the spouse of a mortgagor, the court shall determine whether that spouse shall pay the thirty percent security deposit.

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

Regulation 13 (1) gives the court discretionary powers. Secondly, it deals with the adjournment or stoppage of the sale. In this particular case, the actual outstanding amount is in dispute. How will the 30% of the outstanding amount be determined? The regulation provides for the payment of a deposit of 30% of the forced sale value or the outstanding amount. For the moment the outstanding amount is in dispute and the two positions of the parties cannot be reconciled without considering this suit on the merits. Secondly, there are serious questions that arise as to how the amounts in annexure D being the loan account of the Applicant were arrived at and whether there was compliance with law and contract.

Thirdly, there is no evidence of the forced sale value of the suit property. In fact I have duly considered the written submissions of the Respondent’s Counsel and his submission among other things is that the forced sale value can be determined upon a valuation of the mortgaged property. The problem with the submission is that it is a statutory requirement before advertisement of the mortgaged property for sale for there to be a valuation of the property under regulation 11 of the Mortgage Regulations 2012 which provides as follows:

“11. Valuation of mortgaged property

- (1) The mortgagee shall before selling the property, value the property to ascertain the current market value and the forced sale value of the property.
- (2) For the purposes of sub regulation (1), the valuation report shall not be made more than six months before the date of sale.
- (3) The valuation report shall contain the current pictures of the property, including—
 - (a) the front view of the property;
 - (b) the side view of the property; and
 - (c) the detailed description of the property”.

It is a mandatory requirement for the mortgagee to ascertain the market value and forced sale value of the mortgaged property before sale thereof. Obviously regulation 13 can only be applied with a clear understanding or evidence of the valuation of the suit property. I have considered the demand notices of the Respondent dated 10th of December 2016, and other demand notices dated 15th of November 2016 and a demand notice/notice of intention to sue dated 6th of March 2017. None of the documents attached to the affidavit in reply to the application of Mr Sehab Charania contains the valuation of the suit property. It is also a further requirement that the valuation has to be done prior to the sale of the suit property and at most six months or a lesser period before the sale. In other words the property cannot be sold without valuation of the mortgaged property as that would be in breach of statute. In those circumstances can regulation 13 be applied blindly without considering the antecedent of the threatened sale? I think not. For instance that court has to be satisfied that there was compliance with the provisions of section 19 of the Mortgage Act 2009 prior to sale and the procedure prescribed for sale. Similarly valuation of the property is a condition precedent to sale. The Respondent by insisting on Regulation 13 of the Mortgage Regulations should satisfy the court that it has compliance with the statutory conditions precedent. Failure to do so mean it cannot insist on the strict enforcement of the statute.

Finally, I have considered the contention that the Applicant is in contempt of court having failed to deposit US\$12,000 according to the order of the court dated 24th May 2017. The record shows that on 7th June, 2017 the Respondents Counsel acknowledged receipt of the US\$12,000 pursuant to the court order. By accepting the amount of money, the Respondent waived its right to object to the application on the ground of failure to make the deposit of US\$12,000 as directed by the court.

Furthermore, I have considered the fact that the Applicant admits owing about US\$50,000 and has already deposited US\$12,000 with the Respondent. Secondly, upon stoppage of the sale, for more than 14 days and Regulation 13 (7), fresh notice has to be issued for the sale of the suit

property. Under the regulations therefore, this suit property cannot be sold without a fresh notice under Regulation 8 of the Mortgage Regulations 2012, being issued.

“8. Sale by mortgagee to be by public auction.

(1) A mortgagee exercising a power of sale under the Act shall subject to the Act and these Regulations, sell the mortgaged property by public auction.

(2) After giving the notice required by section 26 of the Act, the mortgagee shall give notice of the public auction by advertising the intended sale in a newspaper of wide circulation.

(3) The advertisement in sub regulation (2) shall include a coloured picture of the mortgaged property and specify—

(a) the time and place of sale; and

(b) the time at which the property may be viewed by the public.

(4) A sale shall not take place before the expiration of twenty one working days from the date of service of the notice as specified in section 26 of the Act.

(5) A person who contravenes this regulation commits an offence and is liable on conviction to a fine not exceeding seventy two currency points or imprisonment not exceeding three years or both.”

Notice of 21 working days amount to a period of one month. Secondly, the property must have a valuation report indicating the market value and forced sale value. Finally it is in the interest of justice that the Applicant is given an opportunity to present her case.

The Respondent has not proved that it is entitled to enforce the terms of the statutory provisions allowing a mortgagee sale of property. There is likelihood that any sale of the suit property at this stage of the proceedings would be in breach of statutory provisions for instance that relating to the valuation of property before sale. Breach of statute cannot be atoned for by an award of damages and cannot be sanctioned by the court.

In the premises, the Applicant’s application succeeds on the following terms:

1. The Applicant shall deposit an additional US\$3,000 within a period of 45 days from the date of this order with the Respondent.
2. A temporary injunction issues restraining the Respondent/Defendant, its agents, representatives, nominees, or assignees from attaching, selling, transferring, alienating and or interfering with the Applicants legal or physical possession of property comprised

in LRV 4208 folio 15 plot 39 Sadler Way, Kampala pending the disposal of the main suit or until any further orders of this honourable court.

3. The costs of this application shall abide the outcome of the main suit.

Ruling delivered in open court on 30th June, 2017

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Kenneth Akampurira Counsel for the Respondent

Counsel Johnny Patrick Barenzi for the Applicant is absent

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

30th June, 2017