

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

MISCELLANEOUS APPLICATION NO. 590 OF 2018

(ARISING FROM HCCS NO. 621 OF 2018)

NAMUKASA SARAH NSAMBA.....APPLICANT

VERSUS

LETSHEGO UGANDA LIMITED..... RESPONDENT

BEFORE: THE HON. JUSTICE RICHARD WEJULI WABWIRE

RULING

The Applicant's application is brought under order 41 rules 1 and 9 of the Civil Procedure Rules and sections 64(e) and 98 of the Civil Procedure Act. It is for orders that a temporary injunction issue restraining the respondent from disposing of or dealing with the properties comprised in Busiro Block 203 Plot 557 land at Nkowe 15 and Busiro Block 204 Plot 1523 land at Kakiri Wakiso district pending the hearing and determination of the main suit and for costs of the application to be provided for.

The Application is supported by the Applicants affidavit in which she avers that that she has a prima facie case. Secondly, that she would otherwise suffer irreparable loss that cannot be adequately atoned for by an award of damages and if the court is in doubt, the application be decided on the balance of convenience.

In the Affidavit in Reply deposed by Waiswa Roger the Respondents loan Officer, he avers that Applicant defaulted on her loan repayment upon which default the Applicant and her guarantors were issued with a default notice to rectify the 25 default but all in vain.

The Applicant's Counsel submitted that the applicant's loan facility was mismanaged by the respondent by making imprecise debits and entries and even disbursing lesser sums of money than the agreed sums.

That the respondent did not serve the applicant with statutory notices of default 30 and sale respectively as by law required but went ahead to paint the applicant's property comprised in Busiro Block 204 Plot 1523 land at Kakiri with words "BANK PROPERTY FOR SALE". That the mode of advertisement is also illegal and irregular as it contravenes the provisions of the mortgage Act and the regulations which oblige the mortgagee to advertise in Newspapers but not merely painting one's 35 property with slandering words as the respondent did. That the applicant filed civil suit No. 621 of 2018 against the respondents for orders that the respondent breached the loan facility agreement, that the applicant's mortgaged properties were wrongful advertised and a permanent injunction order restraining the respondent and its agents from disposing of the applicant's mortgaged properties 40 on account of an illegal advertisement and improper sum demanded. He submitted that the applicant's case against the respondents has a high probability of success and thus if Misc. Application No. 590 of 2018 is not granted, the actions of the Respondent as orchestrated and all these illegalities cited in civil suit of 621 of 2018 will continue unabated to the detriment of the applicant. That Civil Suit No. 621 of 45 2018 raises a prima-facie case with high chances of success.

In reply the respondent's Counsel cited the case of Legal Brains Trust v Attorney General (Misc. Application no. 638 of 2014), where it was held that for there to be a prima facie case, court must be satisfied that there is a serious question to be tried. He submitted that from paragraph 6 of Mr. Waiswa Roger's affidavit in reply, 50 it is clearly revealed that the Applicant borrowed twenty five million shillings from the Respondent having pledged the suit property and he has defaulted on the same. That the Respondent has a legal right to sell the mortgaged property. That the Applicant's application does not raise a prima facie case with a probability of success.

55 The applicant's Counsel submitted that while a monetary figure can be placed on the financial loss that the applicant shall suffer by the high handed attempts by the respondent to deprive her of property, the applicant's loss of the physical interest in the suit land and the subsequent dent on its recovery as a result of the illegal actions of the respondents cannot be adequately atoned for by any award of 60 damages. That the applicant stands to suffer irreparable harm which cannot be reasonably compensated by an award of damages.

In reply the respondent's Counsel submitted that the Applicant in her affidavit in support has not demonstrated how if the land is sold, it would be impossible to adequately compensate her in damages. The Applicant only states, in her 65 submissions, that she stands to lose a physical interest in the suit property. She does not demonstrate how this loss is incapable of being adequately compensated with an award of damages. He submitted that she therefore has not demonstrated that she is likely to suffer any irreparable damage. He cited the case of Legal **Brains Trust v Attorney General**, that irreparable injury was defined to mean one that 70 cannot be adequately atoned for in damages.

On balance of convenience, the Applicant's Counsel invited court to refer to the case of **Jover Byarugaba Versus AH Muhoozi & Kashaija Robert John Misc. Applic. No. 215 of 2014** citing the case of **Victoria Construction works Ltd Versus Uganda National Roads Authority HMA No. 601 of 2010** when determining in whose favour
75 the balance of convenience lies.

He submitted that the status quo which court needs to preserve is to restrain the respondents or their agents from alienating and or dealing with the land in any way to the detriment of the applicant.

In reply, the respondent's Counsel contended that the Applicant/mortgagor had
80 not made any security deposit and as such this application should be dismissed for offending Regulation 13 (4) of the Mortgage Regulations of 2012.

The respondent's Counsel further submitted that the Applicant does not demonstrate how she is likely to suffer if the application for a temporary injunction is not granted and that she can after all be compensated by an award of damages
85 if court decides in her favour later, while on the other hand, the Respondent daily loses business profits as a result of the money it lent out to the Applicant who has deliberately refused to pay it back. That consequently, the balance of convenience is not in favour of the Applicant but rather, in favour of the Respondent which continues to lose money as a result of this suit. Counsel prayed that application be 90 dismissed.

In rejoinder, the applicant's Counsel submitted that Regulation 13(1) of the Mortgage Regulation as cited by counsel for the respondent is not applicable to this case since the sale of the suit property was not adjourned to another date at the request of the Applicant/Mortgagor.

95 He cited the case of **Nassali V Stanbic Bank Ltd Misc. Application No. 335/2014** where court held that regulation 13(1) of Mortgage Regulations is not applicable to cases where the sale of the suit property was not adjourned to another specific date but stopped by an interim order.

The applicant's Counsel further submitted that the respondent flouted Section 24 of 100 the Mortgage Act and Regulations 8(3) and (4) of the Mortgage Regulations, first by not serving the applicant with statutory notices of default and sale and also failure to effectively advertise the applicant's property for sale in a Newspaper of wider circulation as by law required.

That the respondent having failed to comply with the provisions of the mortgage 105 Act and the regulations therein by failing to serve the applicant with the statutory notices of default and sale respectively and failure to have the mortgaged property effectively advertised as by law required renders the impending sale null & void. Counsel prayed that this honourable court unconditionally allows this application and have the current status quo maintained pending the hearing and disposal of 110 the main suit.

Ruling

I have carefully considered the Applicant's application and affidavits filed in support and opposition to the same. I have also carefully analysed the written submissions of both parties.

115 The grant of a temporary injunction is a discretionary mandate of court exercised to ensure that the ends of justice and underlying matter are not undermined by a change in status quo, prior to resolution of the matter. The principles upon which

court bases the exercise of this discretion were laid down in the case of **Kiyimba Kaggwa versus Katende [1985] HCB at page 23** that;

- 120 i. The applicant must show a prima facie case with a probability of success. The plaintiff need not show that it has the prima facie case with a high probability of success. All that the plaintiff needed to show was that it had an arguable case which merits judicial consideration. See **American Cyanamid company versus Ethicon Ltd [1975] 1 All ER at page 504**
- 125 ii. The injunction would normally be refused unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated for by an award of damages.
- iii. If the court is in doubt, it will decide the application on the balance of convenience.

130 In the applicant's submissions, she states that the respondent never served her with the requisite statutory demand notices as provided for in the Mortgage Act and Regulations.

The Applicant's Counsel further states that the respondent did not follow proper procedure in conducting the sale. The provisions of the law on demand notices and
135 procedure for sale of a mortgaged property are provided for in Sections 19, 20, 26 and 28 of the Mortgage Act.

Whereas the evidence on record is of a Notice of Default issued on the 15th November 2017 having been served upon the Applicant and her Guarantors, the record has no evidence of the statutory notice required under Section 26(2) of the

140 Mortgage Act. The Respondents are therefore faulted for non-compliance with this requirement.

The process of the sale having been flawed as has been concluded, it would be improper to require the Applicant to make the 30% security deposit required by the Mortgage Regulations.

145 In considering whether a prima facie case is made, what is required for the court to be satisfied is that the claim is not frivolous or vexatious and that there are serious questions to be tried.

I find that the Applicant raises serious questions that require to be tried by court to establish whether indeed the Statutory Notices envisaged under the Mortgage Act
150 were served on the applicant and whether a proper procedure of sale was followed.

On irreparable damage, if the injunction is denied, the harm that may be suffered by the applicant is one that can be atoned in damages and as such there is no irreparable damage that would be suffered by the applicant if the injunction is denied.

155 On a balance of convenience, the Applicant stands to suffer greater inconvenience than the respondent would if the suit property is disposed of before resolution of the main suit. I find that the balance of convenience is in favour of the Applicant.

In the event, a temporary injunction does issue restraining the respondents its servants, agents, assignees, partners or other entity by whatever name claiming

160 under the respondent's from disposing of the properties comprised in Busiro Block
203 Plot 557 land at Nkowe and Busiro Block 204 Plot 1523 land at kakiri Wakiso
District pending the hearing and determination of Civil Suit No. 621 of 2018.

The costs of the Application shall abide the outcome of the main suit.

Ruling delivered this 4th Day of March 2019

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Richard Wejuli Wabwire

JUDGE