THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE NO. 33 OF 2018

IN THE MATTER FOR AN APPLICATION FOR ORDERS THAT THE MORTGAGEE BE GRANTED VACANT POSSESSION OF PROPERTY ON LAND COMPRISED IN KYADONDO BLOCK 38 PLOT 55 AT MAKERERE AND AN ORDER FOR THE MORTGAGEE TO BE ALLOWED TO INSPECT THE PROPERTY WITH THE POTENTIAL BUYERS.

EQUITY BANK (U) LTD :: APPLICANT

VERSUS

BUYINZA JOHN :: RESPONDENT

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

Introduction

This application was brought by Notice of Motion under Sections 7 and 8 of the Mortgage Act 2009, the Mortgage Regulations 2012, Section 98 of the Civil Procedure Act and Order 37 Rules 4 and 8 of the Civil Procedure Rules seeking orders that:

1. The Applicant/Mortgagee takes vacant possession of property on land comprised in Kyadondo Block 38 Plot 55 at Makerere as provided for under the Mortgage Act 2009 and Mortgage Regulations.
2. The Applicant be granted access to inspect the property on land comprised in Kyadondo Block 38 Plot 55 at Makerere.
3. Costs be provided for.

The application was supported by the affidavit of Denis Kyewalabye Kimanje, a legal officer with the Applicant, which lays out the grounds of the application. Briefly, the grounds were that:

a) The Applicant/Mortgagee in 2012 advanced to the Respondent/Mortgagor a credit facility of USD 1,211,650 to convert the Mortgagor's existing credit facility from Uganda Shillings to United States Dollars.
b) The Respondent secured the facility by property comprised in Kyadondo Block 38 Plot 55 at Makerere registered in the names of the Respondent.
c) The Applicant disbursed the credit facility through the loan account number 1038500779340.
d) The Respondent has willingly rejected, absconded or refused to effect repayment of the facility.
e) The Applicant had commenced the process of foreclosure in respect of the credit facility by issuing the 45 days default notice, the 21 sale notice and advertising sale of the property in the Daily Monitor Newspaper of 22nd February 2018.
f) The Respondent has neglected the demands and has denied the Applicant's agents and the prospective purchasers access to the mortgaged property without reasonable justification.
g) Regulation 12 of the Mortgage Regulations 2012 gives a right to the Mortgagee and the prospective purchasers to access and inspect the property and in the event that the Mortgagor denies access, then the court can, upon an application, grant an order for vacant possession for purpose of inspection and sale.
h) The Applicant had pursued their rights as provided for under the Mortgage Act and the Regulations and had brought this application in good faith.

i) The Applicant shall suffer irreparable loss and damage if the application is not granted and it is fair, just and equitable that the application is granted.

The Respondent opposed the application vide an affidavit sworn by himself whose averments are summarized below, namely that:

a) The Respondent was advised by his advocates that the application was incompetent, unknown in law, frivolous and vexatious, and an abuse of court process and, on these grounds, it ought to be dismissed.
b) The matters raised in this application and the reliefs sought are the subject of HCCS No. 498 of 2017: John Buyinza versus Kasumba Baisa Idi and Equity Bank Ltd (the applicant herein) which is pending hearing before this Court. In the said suit, the Applicant filed a counter claim seeking recovery of the same monies subject of this application.
c) The deponent of the affidavit in support of the application, Denis Kyewalabye Kimanje, has no authority to swear the affidavit on behalf of the Applicant and the affidavit ought to be struck off.
d) In the alternative but without prejudice to the foregoing, the Respondent opposed, in substance, the averments in the said affidavit in support of the application, and stated that:

(i) In response to paragraph 6 thereof, it was not true that the Respondent ever requested and was offered a loan facility that was offered to him by letter dated 27th October 2017 by which date the Respondent had already filed HCCS No. 498 of 2017 against the Applicant.

(ii) It was the Applicant's officials that advised the Respondent to convert his loan account from Uganda shillings to United States Dollars.

(iii) Regarding the credit facility to finance the purchase of property comprised in LRV 240 Folio 20 Plot 16B Old Kampala Road, it was the Applicant's officials who approached the Respondent and convinced him to take over the credit facility that had been extended to one Kasumba Baisa Idi who had failed to service the loan and the Applicant Bank was contemplating foreclosing on the said property which the said Kasumba Baisa had placed before the Bank as security. The Respondent included a set of particulars of actions undertaken by the Applicant in the course of persuading him to take over the no-performing loan.

(iv) In response to paragraph 10 of the affidavit in support, the averment that the credit facility II (the subject of this application) was disbursed on loan account number 1038500779340 is completely false as the same was disbursed on loan account number 1038500676483.

(v) It was not true that the Respondent absconded his repayment obligation on facility II since he fully cleared the said facility and he owed no money to the Applicant in respect of the same.

(vi) The whole foreclosure process was unlawful and the default notice, the sale notice and advertisement notice were issued inspite of correct facts, contrary to the law and in bad faith. The foreclosure and particularly the threatened sale of land comprised in Kyadondo Block 38 Plot 55 at Makerere was an illegal and disguised attempt to recover money in respect of facility I (concerning land on Plot 16B Old Kampala) which

went bad and is the subject of Civil Suit No. 498 of 2017 pending before this Court. In the said suit, the Applicant filed a counter claim against Kasumba Baisa Idi for recovery of UGX 2,071,718,499.85/= which was the sum outstanding at the time the Respondent was persuaded to enter into the transaction for purchase of Plot 16 B Old Kampala.

(vii) The claims by the Applicant herein are also the subject of an appeal by the Applicant against the ruling of the High Court vide HCCS No. 764 of 2014 (Land Division): Kasumba Baisa Idi Vs Aneez S.B Jaffer & Ors; in which the Applicant claimed *interalia* compensation for its mortgage interest in the property at Plot 16B Old Kampala from the Attorney General of Uganda and the Departed Asians Property Custodian Board.

(viii) Notwithstanding the named pending cases, the Applicant had not refunded the Respondent's money amounting to USD 546,700 which, if offset and applied to facility II, is more than sufficient to extinguish the Applicant's claims.

(ix) The Applicant's demands for recovery of monies have inconsistent and varying figures which should not be relied upon.

(x) In the premises, the Applicant has no right to foreclosure and no right to access and inspect the property in issue.

(xi) The provisions of the law relied upon by the Applicant do not apply to the facts of the case before the Court.

(xii) The application was brought in bad faith.

The Applicant did not file any affidavit in rejoinder.

Background

This matter has a somewhat checkered background. Sometime in 2012, the Respondent herein obtained a loan facility from the Applicant Bank and executed a mortgage over property comprised in Kyadondo Block 38 Plot 55 Makerere. After some time, the Respondent was convinced to convert this loan facility from Uganda Shillings to United States Dollars. At the same time, the Applicant Bank had a mortgage with one Kasumba Baisa Idi over property comprised in LRV 240 Folio 20 Plot 16B at Old Kampala. It is alleged that the said Kasumba Baisa Idi had defaulted on his obligations and the loan was becoming non-performing. According to the Respondent, he was convinced by the Bank officials to take over Kasumba's loan by obtaining another facility with the Applicant Bank to finance the purchase of the property on Plot 16B Old Kampala.

The Respondent was therefore given two credit facilities by the Applicant Bank, namely; USD 942,308 (called Facility 1) for purpose of taking over the loan of Kasumba Baisa Idi/ finance the purchase of property comprised in LRV 240 Folio 20 Plot 16B Old Kampala; and two, USD 1,211,650 (called Facility 2) to convert the Respondent's existing loan from Uganda Shillings to US Dollars. The Applicant Bank was already in possession of both certificates of title. It thus created a new charge on the property comprised in Kyadondo Block 38 Plot 55 Makerere as security for both facilities. The property on Plot 16B was to be transferred from the names of Kasumba Baisa Idi into the Respondent's names. The transfer was to be effected by the Applicant Bank and thereafter cause registration and lodging of the mortgage deed on the property.

After sometime however, the Respondent discovered that the Applicant Bank had failed to effect the transfer and registration on account of a dispute over the said land (Plot 16B) between Kasumba Baisa Idi and Equity Bank (U) Ltd as plaintiffs and Aneez S.B Jaffer as one of the defendants vide HCCS No. 764 of 2014. In the suit, Aneez S.B Jaffer was sued together with the Attorney General of Uganda and the Departed Asians Property Custodian Board. This suit was adjudged by the Court as being res judicata on account of an earlier consent judgment between Aneez S.B Jaffer and one Atwooki B. Ndahura. The Plaintiffs (Kasumba Baisa and Equity Bank (U) Ltd) have since lodged an appeal against that decision.

The connection between Kasumba Baisa Idi and Aneez S.B Jaffer to property on Plot 16B Old Kampala was that one Atwooki B. Nduhura was said to have sold the said property to another Agnes Mbabazi Kabwiso; who in turn sold the property to Kasumba Baisa Idi. Kasumba had the property registered in his names and mortgaged it with Equity Bank (U) Ltd. On the other hand, Aneez S.B Jaffer claimed that he had obtained the same property by way of repossession and had had it registered in his names. As such the property in issue had two titles subsisting at the same time. The said Aneez S.B Jaffer had instituted HCCS No. 437 of 2004 against Atwooki B. Nduhura and Benard S. Tumwesigye. The matter was settled by consent whereupon the defendants gave vacant possession of the suit land (Plot 16B) to the plaintiff (Aneez S.B Jaffer). It was on basis of this consent that HCCS No. 764 of 2014 was adjudged to be res judicata.

It is stated by the Respondent that despite the above set out facts disclosing pending disputes over both properties, the subject of the mortgages between the Respondent and the Applicant Bank, the

Applicant Bank went ahead and served a notice of default and sale of the Respondent's property on Block 38 Plot 55 at Makerere. The Applicant Bank further went ahead to bring the present application in furtherance of the intention to sell the mortgaged property inspite of the unresolved disputes which the Applicant Bank was privy to before transacting with the Respondent.

When the present matter was filed, it was heard by a Judge in the Land Division who directed the Counsel for the parties to file written submissions and set the case for Ruling. Before the Ruling was delivered, this case file together with the pending HCCS No. 498 of 2017 were transferred to the Commercial Division under an administrative arrangement concerning cases involving mortgages. I therefore inherited this case file at the level of Ruling.

Submissions by Counsel

When the case came up for mention before me on 10th February 2020, the Applicant was represented by Ms. Rebecca Nakiwala and Ms Barbara Akullo while the Respondent was represented by Mr. Denis Kwizera. Counsel agreed that filing of submissions had closed and the matter was pending Ruling. The submissions by both Counsel are on record and I will consider them in the course of resolution of the issues that are up for determination by the Court.

Issues for Determination by the Court

On record and in the submissions by the Counsel, no issues were agreed upon for determination by the Court. But from the pleadings and the arguments of the parties, three issues arise for determination by the Court, namely:

1. Whether the application is properly before the Court.

2. Whether the Applicant is entitled to an order of vacant possession of property comprised in Kyadondo Block 38 Plot 55 Land at Makerere in foreclosure upon a mortgage between the parties.
3. What remedies are available to the parties?

Resolution of the Issues

Issue 1: Whether the application is properly before the Court.

In his submissions in reply, Counsel for the Respondent raised a number of matters concerning the competence of the application and, in the alternative, its lack of merit. Unfortunately, the Applicant's Counsel did not make any submissions in rejoinder and, as such, did not make any response to the matters raised in the submissions in reply. The Applicant had notice of these matters since they were contained in the affidavit in reply filed by the Respondent. The Court was not told why the Applicant's Counsel did not seize the opportunity of responding to the matters despite the huge time lag between the filing of the Respondent's submissions on 9th May 2018 and 10th February 2020 when the matter appeared before me for mention and the same was adjourned for this Ruling. I will therefore take it that the Applicant chose not to respond to the matters raised in the Respondent's affidavit and submissions in reply.

Before considering the merits of this application therefore, I will first deal with these preliminary matters raised by Counsel for the Respondent under the various headings, as below:

a) **Lack of authority to swear the affidavit in support of the application**

Counsel for the Respondent submitted that the application was supported by the affidavit of one Denis Kyewalabye Kimanje who claims to be a legal officer of the Applicant. The said deponent does not state anywhere that he was authorized to swear the affidavit on behalf of the Applicant. No written authority to the effect was attached. Counsel relied on the authority in **Joy Kaingana vs Dabo Boubou [1986] HCB 59** and **Lena Nakalema Binaisa & 3 others Versus Mucunguzi Myers HC-MA-No 460 of 2013(Land division)** to submit that an affidavit is defective by reason of being sworn on behalf of another without showing that the deponent had the authority of the other. Such an affidavit ought to be struck off the record.

Counsel for the Respondent further submitted that looking at the present application, one can only conclude that the affidavit and indeed the whole application was a frolic of Kimanje and not the applicant bank. Counsel prayed that the affidavit be struck off the record and the application, which remains unsupported by evidence, would accordingly fail and be struck off as well.

As already stated above, the Applicant's Counsel made no reply to this submission.

The objection by Counsel for the Respondent on this point is based on lack of authority on the part of the deponent (Denis Kyewalabye Kimanje) to swear an affidavit on behalf of the Applicant. Counsel for the Respondent also questions the capacity of the deponent to swear the affidavit. According to the affidavit in support of the application

sworn on 12th April 2018 and filed in Court on 16th April 2018, the deponent states in paragraph 1 thus:

"That I am a male adult Ugandan of sound mind and the legal officer with the Applicant … herein and I depone hereto in that capacity".

In paragraph 2 of the affidavit, the deponent states:

"That as a legal officer, my duties include but are not limited to investigating claims of whatever nature against the Bank in coordination with other specialized departments of the Bank, to follow up on such claims, to establish their legality and to advise the Bank accordingly".

From the above averments, it is not true that the deponent did not indicate the capacity in which he deponed to the affidavit. He clearly did. The other argument was that he did not indicate that he had authority to swear the affidavit on behalf of the Applicant and did not attach evidence of such authority in writing as required under Order 1 Rule 12 (2) of the CPR; which position was confirmed in a number of decided cases including **Joy Kaingana vs Dabo Boubou (supra)** and **Lena Nakalema Binaisa & 3 others Versus Mucunguzi Myers (supra).**

Order 1 Rule 12 of the CPR provides –

(1) ***Where there's more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for that other in any proceedings, and in like manner, where there are more defendants than one, any one or more of them may be authorised by***

any other of them to appear, plead or act for that other in any proceedings.

(2) ***The authority shall be in writing signed by the party giving it and shall be filed in the case.***

The above provision, clearly in my view, provides for a situation where there is more than one plaintiff or defendant and one seeks to appear, plead or act for the other in a proceeding before the court; in this case, swearing an affidavit for or on behalf of the other. The other situation is where a person is swearing the affidavit in a representative capacity. That was actually the *ratio decidendi* in the cases cited by Counsel for the Respondent. In **Joy Kaingana vs Dabo Boubou (supra) (Karokora Ag. J as he then was)**, the learned Judge stated:

> *"A person is competent to swear an affidavit on matters or facts he knows about or on information he receives and believes.*
> *Whereas the deponent in this application claimed that he was fully acquainted with the facts deposed to nevertheless he swore the affidavit in a representative capacity.*
> *There was no authority given to him by the defendant to qualify him to act on his behalf either as his advocate or a holder of a power of attorney or duly authorized. The affidavit was therefore incompetent and defective".*

In the case of **Lena Nakalema Binaisa (supra) (Bashaija J.),** the learned Judge relied on the provisions of Order 1 Rule 12 of the CPR to hold that an affidavit is defective by reason of being sworn on behalf of another without showing that the deponent had the authority of the other. In the **Nakalema case (supra)**, three applicants who were joint administrators of an estate brought an application seeking to be added as parties to a suit. Only one of the applicants deposed to an affidavit

purporting to swear it on behalf of the other two. The Court found that the deponent was neither authorized nor had the capacity to swear the affidavit on behalf of the other applicants in absence of a written authority as provided for under Order 1 Rule 12 (2) of the CPR. The Court found that the affidavit was incurably defective for non-compliance with the requirements of the law.

The Court went further to hold that whether it be a representative action under ***O.1 rr.10(2) and 13 CPR*** or a suit by a recognised agent under ***O.3 r.2 (a) CPR*** or by order of court, the person swearing on behalf of the others ought to have their authority in writing which must be attached as evidence and filed on the court record. Otherwise there would be no proof that the person purporting to swear on behalf of the others has their express authority.

In an earlier case of ***Taremwa Kamishana Tomas v. Attorney General, HC Misc. Application No. 38 of 2012***, the same Court (as in the Nakalema case) had dealt with a similar issue. But in the ***Taremwa case***, 9 persons had secured a representative order to represent themselves and other 5000 persons. Only two of the 9 applicants deponed to affidavits. Counsel for the respondents objected to the capacity and authority of the two deponents to swear affidavits on behalf of the other applicants who had received a representative order in their respective capacities.

The learned Judge held that where the party obtains a representative order, it is sufficient authority to represent himself/herself and others in the same interest and he or she can swear an affidavit on his or her own behalf and on behalf of the others represented. Conversely, where a party swears an affidavit on his or her own behalf and on behalf of

the others without the others' authority when it is not a representative suit, the affidavit becomes defective for want of authority.

In the matter before this Court, the case is neither a representative suit nor is the deponent of the affidavit deposing on behalf of another in a case where there are more applicants than one. The deponent of the affidavit in support clearly indicated that he was swearing the affidavit in his capacity as the legal officer of the Applicant Bank. The facts and circumstances of this case are therefore, in my view, distinguishable from the earlier discussed authorities.

Under the law, the rules governing conduct of court actions by corporations are different from those that govern individual persons. Under **Order 29 Rule 1 of the CPR**, in a suit by or against a corporation, any pleading may be signed on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

There is no evidence before the Court that as the legal officer of the Applicant Bank carrying the mandate indicated in the affidavit in issue, the deponent thereof was not a principal officer of the Applicant Bank with capacity to depose to the facts of the case.

In the case of **Friecca Pharmacy Ltd vs Anthony Natif HC M.A No. 498 of 2019, Ssekaana J.,** faced with the same scenario, held the view that **"it would be taking it too far to find that every employee of the company should have authorisation to swear on matters of the company. The law presumes that certain categories of employees have ostensible authority to act for the company"**. In that case, the affidavit had been sworn by the Company Secretary

which was found by the Court to be permissible under the law without need for special authorisation.

I am in agreement with the above view expressed by my learned brother and I hold the view that in the present case, Mr. Denis Kyewalabye Kimanje, the deponent of the affidavit in support herein, qualifies as a principal officer of the Applicant Bank with capacity to depose to the facts of the case. He therefore did not require to attach to his affidavit evidence of special authorization before deposing to the facts herein. The affidavit is therefore properly before the Court and this point of objection is disallowed.

b) The application is an abuse of the court process, is incompetent, unknown in law, frivolous and vexatious

Counsel for the Respondent submitted that the present application before the Court is an abuse of the process of court on the ground that the matters complained of and the reliefs sought in the application are the subject of HCCS No. 498 of 2017 which is pending before this very Court and was already fixed for hearing. Counsel for the Respondent submitted that in the said suit, the present Applicant raised three suits by way of counterclaims; all claiming recovery of the same monies subject of the present application. Counsel for the Respondent further pointed out that the same claims are subject of an appeal by the Applicant against the Ruling and Orders of the Court in HCCS No. 764 of 2014: Kasumba Baisa & Equity Bank (U) Ltd versus Aneez S.B. Jaffer & 2 Others. Counsel for the Respondent relied on the case of **Springs International Hotel Ltd vs Hotel Diplomate Ltd & Anor HCCS No. 227 of 2011** in which the issue of abuse of court process

in the sense of filing a multiplicity of suits relating to the same subject matter or by or against the same parties was dealt with.

Let me begin by setting out the provisions of the law relevant to this claim.

Section 17(2) of the Judicature Act enjoins the High Court to exercise its inherent powers to prevent abuse of the process of the court by curtailing delays, including the power to limit and stay delayed prosecutions as may be necessary for achieving the ends of justice.

Section 98 of the Civil Procedure Act (CPA) provides for the inherent power of the High Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Section 33 of the Judicature Act provides, among others, that the High Court shall in exercise of its jurisdiction ensure that all multiplicities of legal proceedings concerning any matters before it are avoided.

Under **Section 6 of the CPA**, it is provided 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, 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.

At law, abuse of court process involves "the use of the process for an improper purpose or a purpose for which the process was not established." See ***Attorney General vs. James Mark Kamoga & Anor, SCCA No. 8 of 2004,*** (**Mulenga JSC**) quoting the ***Black's Law Dictionary (6th Ed)***.

In the case of ***Springs International Hotel Ltd vs Hotel Diplomate Ltd & Anor (supra)***, **Andrew Bashaija J.** discussed the subject of abuse of court process as it relates to the *lis pendens rule* and to the filing of a multiplicity of suits. Quoting the ***Black's Law Dictionary (8th Ed)*** the Learned Judge stated that *"lis pendens",* is a Latin expression which simply refers to a *"pending suit or action".* The learned Judge held that the principles that underpin the *lis pendens rule* are encapsulated in the provisions of **Section 6 of the CPA** which simply means that no court ought to 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; and or the previously instituted suit or proceeding is between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed.

On the relationship between abuse of process and the filing of a multiplicity of suits, the learned Judge had this to say:

> ***It is my considered opinion that one such instance of potential abuse lies in the filing of multiplicity of suits in court, such as the plaintiff did in the instant case. Therefore, when the above enunciated principles are applied***

to facts of the instant case, it is doubtless that the plaintiff acted in abuse of court process by filing the instant suit well knowing that another suit ... was pending in another court with parties and issues directly and substantially the same as in the instant case. The plaintiff herein was acutely alive to the fact that the defendants in the instant suit had instituted an earlier suit against it in HCCS No. 126 of 2009, in which the subject matter of the suit (Plot 971) was directly the same as in the subsequent suit. The plaintiff herein knew or ought to have reasonably known that the resolution of the issues, particularly one that relates to ownership and the propriety of transfers (on) Plot 971, would finally and conclusively resolve any other issues in the subsequent suit.

The filing of a multiplicity of suits was not just an abuse of court process but potentially exposed the concerned judicial officers to the danger of arriving at different and perhaps conflicting decisions in cases of the same facts. This would have far reaching consequences as it would create uncertainty and inconsistency in court decisions. Uncertainty and inconsistency of court decisions are vices which have the undesirable consequences of, among others, undermining the doctrine of precedent which is the mainstay of our jurisprudence. For these reasons courts frown at the perpetrators of the vices, and normally invoke the heaviest possible sanctions in their arsenal; not just to penalize but also curtail such vices. To that end, the instant suit is struck out and dismissed for being an abuse of court process, with costs to the defendants.

In the instant case, it has been shown by the Respondent, and not disputed by the Applicant, that the matters complained of and the reliefs sought in this application are the subject of HCCS No. 498 of 2017 which is pending before this very Court and was already fixed for hearing. It was further shown that in the said suit, the present Applicant raised counterclaims, claiming recovery of the same monies, or part thereof, subject of this application. The Respondent further pointed out that the same or related claims are subject of an appeal by the Applicant against the Ruling and Orders of the Court in HCCS No. 764 of 2014: Kasumba Baisa & Equity Bank (U) Ltd versus Aneez S.B. Jaffer & 2 Others. Counsel for the Respondent therefore submitted that this application was not only unnecessary but was also filed in abuse of the court process.

The Respondent attached, to his affidavit in reply, the pleadings that relate to the above named suits. In HCCS No. 498 of 2017, the Respondent is the plaintiff against Kasumba Baisa Idi and Equity Bank (U) Ltd as 1st and 2nd defendants respectively. As shown in the background to this application, the Respondent obtained two facilities from the Applicant. Both facilities created a charge on land comprised in Kyadondo Block 38 Plot 55 Makerere (the property sought to be sold vide this application). HCCS No. 498 of 2017 was filed on the 10th July 2017. This application was filed on the 16th April 2018. In HCCS No. 498 of 2017, the subject matter is the same property described above (Kyadondo Block 38 Plot 55 Makerere). In the suit, the plaintiff (Respondent herein) is seeking declarations and orders against sale of the said property. The plaintiff also denies any indebtedness to the 2nd defendant (Applicant herein) in respect of the credit facilities claiming that he has since extinguished his obligations.

In the counterclaim filed by the Applicant Bank (2nd defendant in HCCS No. 498 of 2017), on 4th August 2017, the counterclaimant claims that the 1st counter defendant (Respondent herein) is indebted to the counterclaimant and seeks recovery of monies outstanding on the two facilities offered to the 1st counter defendant (Respondent). It is on account of these same monies or part thereof that the property of the Respondent is sought to be sold vide the present application.

It is clear to me that by the time the Applicant Bank brought this application, they were already aware of the pendency of HCCS No. 498 of 2017 and had already filed a counterclaim therein. The only questions to determine now are whether;

(i) the matter in issue in the present application is also directly and substantially in issue in a previously instituted suit or proceeding;

(ii) the previously instituted suit or proceeding is between the same parties; and

(iii) the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed.

In case the above questions are determined in the affirmative, then the subsequent matter shall be deemed to be in contravention of the *lis pendens rule* and, considering the existing circumstances when the same was filed, will amount to abuse of court process on account of filing multiplicity of suits.

Regarding whether the matter in issue in the present application is also directly and substantially in issue in a previously instituted suit or proceeding, evidence on record has shown that the subject matter of the present application is the same in HCCS No. 498 of 2017. The

monies claimed in both suits accrue from the same mortgage agreement between the parties herein in respect of the same property. I am therefore satisfied that the matter in issue in this application is also directly and substantially in issue in a previously instituted suit, namely HCCS No. 498 of 2017.

As to whether the previously instituted suit or proceeding is between the same parties, HCCS No. 498 of 2017 is between John Buyinza (plaintiff) versus Kasumba Baisa Idi and Equity Bank (U) Ltd. Although Kasumba Baisa Idi is not party to this application, the manner in which he got involved in this dispute is clear. He was already a customer of the Applicant Bank with a non-performing loan. Buyiza John (the Respondent) agreed with the Bank to buy off the non-performing loan through a facility offered to the Respondent by the Applicant Bank. This facility created a charge on the property which the Bank wants to sell off vide the present application. It is therefore clear that the real dispute in both suits is between the parties to the present application who are the same parties in the previously instituted suit. This, however, should not be understood to mean that Kasumba Baisa Idi was erroneously sued in HCCS No. 498 of 2017. It is clear in the suit why he had to be sued. The point however is that he did not have to be a party to the present application.

Secondly and equally important, as was found in ***Springs International Hotel Ltd vs Hotel Diplomate Ltd & Anor***, the phrase "same parties" in the context of the *lis pendens rule* does not have to relate to literally all the parties to the two suits; the parties just need to be directly or substantially the same. I find it the case in the matter before the Court.

On the third requirement, it has already been indicated that both suits were initially instituted in the High Court Land Division and both were subsequently transferred to this Division. As such, the previously instituted suit is pending before the same Court.

In light of the above, it has been established that the filing of the present application was in contravention of the *lis pendens rule*. The application was therefore expressly barred by law and ought to be dismissed on that ground. Secondly, it is clear that the Applicant herein was aware of the pendency of the earlier filed suit. They were equally aware of the fact that the monies claimed and the subject matter in both suits were substantially the same. In effect, the Applicant, through exploiting a faster legal process, intended to use the court process to dispose of property that is subject of a dispute still pending before the court. This amounts to abuse of the process of the court and, on this ground as well, this application would fail and ought to be dismissed.

For purpose of completeness, I will briefly make a comment on the other matters raised in the application.

Counsel for the Respondent had further challenged the application on the grounds that it was incompetent, unknown in law, frivolous and vexatious. In view of my finding that the application was expressly barred by law and was filed in abuse of the court process, it becomes unnecessary to dwell on these points any further.

It also follows that the merits of this application cannot be explored. The same are the subject of litigation in HCCS No. 498 of 2017

pending before this Court. The second issue is therefore inconsequential.

In effect therefore, for the reasons given above, this application is dismissed with costs to the Respondent against the Applicant.

It is so ordered.

Signed, dated and delivered by email this 28th day of May, 2020.

BONIFACE WAMALA
JUDGE