THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 0191 OF 2022

(Arising from Civil Suit No. 0125 of 2022)

MORJARIA MAHESHWERY PURSHOTAM …….…….…… APPLICANT

VERSUS

STANBIC BANK UGANDA LIMITED …….…….…… RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

At the applicants instance and request, the respondent advanced her a loan of shs. 30,000,000,000/= on 10th November, 2020. As security for that borrowing, the applicant mortgaged title deeds to land comprised in FRV 1297 Folio 14, Plot 74 Kira Road in Kampala; FRV 1297 Folio 16, Plot 101 6th Street Industrial Area in Kampala; FRV 869 Folio 13, Plots 24 and 26 Entebbe; FRV 1297 Folio 12, Plot 13 Bukoto Street (Kololo Hill) Kyadondo, Kampala; FRV 1297 Folio 17, Plot 1 Kategо Road, Kamwokya Kampala; and FRV 1297 Folio 13, Plot 3 Kayunga Road. When she defaulted on the loan, the respondent took out proceedings by way of High Court Miscellaneous Cause No. 0087 of 2021 for the recovery of shs. 28,319,665,848/= The respondent obtained a decision in its favour on 6th December, 2021 granting it the relief of foreclosure in respect of the above-mentioned property. The property having been foreclosed, it is was further ordered and adjudged that the applicant forthwith delivers to the respondent or as the respondent directs, possession of the mortgaged property or of such part of it as is in the possession of the applicant. The applicant has since then failed and / or refused to honour that decision but instead filed High Court Civil Suit No. 0125 of 2022 from which this application arises.

b. The application.

The application is made under the provisions of section 33 of *The Judicature Act*, section 98 of *The Civil Procedure Act*, section 33 of *The Mortgage Act*, Order 41 rules 1, 52 and 9 of *The Civil*

Procedure Rules. The applicant seeks a temporary injunction order restraining the respondent, its agents, employees, servants, legal representatives or any person claiming for, on behalf of, or under it from advertising, selling and / or dealing with the mortgaged property comprised in FRV 1297 Folio 17, Plot 1 Katego Road, Kamwokya Kampala; FRV 1297 Folio 12, Plot 13 Bukoto Street (Kololo Hill) Kyadondo, Kampala and FRV 869 Folio 13, Plots 24 and 26 Entebbe in any way until the final determination of the underlying suit. The applicant contends that her suit raises triable issues and has a likelihood of success. She acknowledges having borrowed the sum claimed and having paid only one instalment, but defaulted later as a result of the measures taken to combat the Covid19 pandemic, which adversely affected her real estate business. She has since agreed to jointly sell off some of her mortgaged property realising therefore a sum of shs. 1,300,000,000/= US $ 400,000 and US $ 360,000 all of which she paid to the respondent. The respondent has since 1st February, 2022 advertised the remaining property for sale, thereby frustrating the ongoing negotiations with potential buyers by private treaty. In the event that the application is not granted, the applicant will suffer irreparable injury by losing the opportunity to redeem the property.

c. Affidavit in reply

By the 1st respondent's affidavit in reply, it is averred that the issue raised in the underlying suit are *res judicata*, it is an abuse of process and therefore unlikely to succeed. Following a decision delivered in favour of the respondent, the applicant has since then refused to hand over possession to the respondent. Although the property had been advertised for sale on 10th November, 2021 the applicant frustrated the exercise by heavy deployment of armed guards around it. The respondent re-advertised it for sale on 1st February, 2022 but still the applicant has refused to hand over vacant possession. The applicant has not paid the mandatory 30% of the outstanding sum as required by law. The application should not be granted since the applicant is contemptuous, does not stand to suffer any irreparable injury and the balance of convenience is not in her favour.

d. Submissions of counsel for the applicant.

M/s Akamba and Co. Advocates on behalf of the applicant submitted that the issues raised in the underlying suit are not *res judicata*. The applicant has never sued the respondent before. The

previous litigation was initiated by the respondent against another party. Whereas the respondent sought foreclosure and vacant possession in the previous suit, in the current suit the applicant seeks a declaration that advertisement of the property for sale was premature, wrongful and fraudulent; declarations that the intended sale is in bad faith, failure to grant the applicant a moratorium was in bad faith, and that the applicant is not indebted to the respondent in the sum claimed. The applicant therefore seeks a permanent injunction restraining the respondent from selling the mortgaged property. That suits has a likelihood of success. If the application is not granted, the applicant is likely to suffer irreparable damage. She is likely to suffer greater harm in comparison to the respondent in the event that the application is not granted. Apart from alleging contempt, the respondent has not furnished evidence of any contemptuous act committed by the applicant. The current proceedings are not an abuse of process. The court has discretion not to impose the 30% deposit requirement considering the effects of the covid19 lockdowns on the business of the applicant. In the vent that the condition is imposed, the applicant should be given a period of five months within which to comply.

e. Submissions of counsel for the respondent.

M/s Kampala Associated Advocates on behalf of the respondent submitted that the underlying suit is unlikely to success since it is barred by the principle of *res judicata* and is an abuse of court process. The respondent filed a suit for foreclosure yet the current suit is one seeking to challenge exercise of the respondent's powers upon foreclosure. In the decision delivered in the respondent's favour on 6th December, 2021 the applicant was order to hand over vacant possession of the mortgaged property to the respondent. The applicant has since then refused to comply with that order. The applicant having refused to honour a court order, cannot come to the same court seeking equitable relief. By not complying with the court order, she is in contempt of court. The applicant has not paid the mandatory 30% of the outstanding sum as required by law. The amount outstanding is currently shs. 27,046,238,919/= but it continued to attract interest. The applicant does not deny her indebtedness. The suit and the application is frivolous and vexatious. The applicant does not stand to suffer any irreparable loss. The market value of the mortgaged property was established at the time of the borrowing. One of the prayers in the underlying suit is that of

damages, implying that the applicant's claim is quantifiable. The balance of convenience favours the respondent considering that the applicant has been in default for two years now.

f. The decision.

Since the enactment of *The Mortgage Regulations, 2012* temporary and interim injunction orders that have the effect of stopping or adjourning a sale by mortgagee should be granted conditionally and specifically upon a deposit of 30% of the forced sale value of the mortgaged property or outstanding amount (see for example *Haji Edirisa Kasule and another v. Housing Finance Bank Ltd and two others, H. C. Misc. Application No. 667 of 2013; Guaranty Trust Bank (U) Ltd v. Ankole Riverline Hotel Ltd, H. C. Civil Appeal No. 28 of 2014* and *Paunocks Enterprises Ltd and others v. Stanbic Bank (U) Ltd, H. C. Miscellaneous Application No. 1113 of 2014*). Regulation 13 of *The Mortgage Regulations, 2012* 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.
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> (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.

The decisions in effect state that applications for temporary injunctions involving mortgaged property have to be dealt with in conformity with the statutory provisions for mortgages under *The Mortgage Act, 2009*. The statutory requirements under *The Mortgage Regulations* thereby override traditional considerations for the grant of a temporary injunction (see *Willis International Engineering and Contractors Ltd and another v. DFCU Bank, H. C. Misc. Application No. 1000 of 2015* and *Miao Huaxian v. Crane Bank Limited and another, H. C. Misc. Application No 935 of 2015*).

This position is buttressed by the Court of Appeal decision in *Ganafa Peter Kisawuzi v. DFCU Bank Ltd, C. A. Civil Application No. 64 of 2016* where the Court 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 that case, Counsel for the respondent submitted that the applicant had not deposited 30% of the value of the mortgaged property contrary to The Mortgage Regulations. Counsel for the applicant conceded this but submitted that the applicant was willing to deposit the said amount if ordered by the court.

The Mortgage Regulations 2012 were prescribed by the Minister of Lands under section 41 (1) of *The Mortgage Act, 2009* which gives the Minister powers, by regulations, to prescribe anything which may be prescribed under *The Mortgage Act* and generally for the better carrying into effect of the purposes and provisions thereof. The dominant purpose of construction of any statutory provision is to ascertain the intention of the legislature and the primary role is to ascertain the same by reference to the language used.

Regulation 13 is headed "Adjournment or stoppage of sale." The sub-heading shows that the enactment of Regulation 13 was intended to define the conditions upon which a sale by a mortgagee, may be either stopped or adjourned. Where a general statute and a specific statute relating to the same subject matter cannot be reconciled, the special or specific statute ordinarily will control. The provision more specifically directed to the matter at issue prevails as an exception to or qualification of the provision which is more general in nature (see *Warburton v. Loveland, (1824-34) All ER Rep 589*). Since stoppage or adjournment of a sale is governed by special legislation, it prevails over the general requirements for the grant of temporary injunctions specified in Order 41 of *The Civil Procedure Rules*. If it is not constructed in that way the result would be that the special provision would be wholly defeated.

Aside from the internal aids to interpretation of the provision, account must be taken of the object of the enactment in light of the statement of Lord Denning in *Escoigne Properties Ltd v. Inland Revenue Commissioners [1958] 1 All ER 406 (BL) at 414D* that:

> A statute is not passed in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used; and what the object was, appearing from those circumstances, which Parliament had in view. That was emphasised by Lord Blackburn in *River Wear Comrs v. Adamson ((1877) 2 App Cas 743 at 763-5* and by the Earl of Halsbury LC in *Eastman Photographic Materials Co v. Comptroller-General of Patents [1898] AC 571 at 575, 576* in passages which are worth reading time and again.

It follows that even in an area regulated in detail by legislation, policy may be a factor in the court's decisional process; although the policy ascertained and applied may be that which is deemed to have been the legislature's, rather than the court's, conception of the wisest rule. Policy, in the sense of the motivating equitable and practical reasons behind the development of legal principles, plays a constant although usually imperceptible role in the decisional process. Policy, in the sense that justice is the aim and intent of all legal system and procedures, is the spirit vitalising the letters of the law. A statute therefore is to be construed so as to suppress the mischief in the law and advance the remedy (see *Heydon's case (1584) 3 Co. Rep. 7a*). The rule means that where a statute has been passed to remedy a weakness in the law, the interpretation which will correct that weakness is the one to be adopted.

Regulation 13 of *The Mortgage Regulations, 2012* is an enactment of the principle "pay now, argue later." It is designed to restrict the ability of the mortgagor to use litigation or the courts, to vexatiously delay the realisation of money due to the mortgagee. It is intended to reduce the number of frivolous objections to sales by a mortgagee and guarantee that the mortgagee will not be unnecessarily prejudiced by a delay in payments, inevitably occasioned by litigation. It ensures that the mortgagees are not left out of pocket due to the time that lapses over the course of litigation, while on the other hand encouraging a mortgagor to hasten the progress of litigation so as to improve on its ability to expand its business, or pay debts, or to mitigate any detrimental effect imposition of the condition may have had on the mortgagor's liquidity.

It applies to situations where a dispute arises between the mortgagor and the mortgagee regarding their respective rights under the mortgage, before the mortgagee can exercise their power of sale or foreclosure. Although payment of loan instalments is not suspended pending a suit, unless

directed otherwise, the practical reality is that litigation has tended to have that consequence. This provision therefore strikes a balance between the competing desire of the mortgagee to realise the security following default and that of the mortgagor to have his or her day in court on questions regarding the legality or propriety of events triggering that process, whilst the mortgagor pursues his or her various remedies.

While on the one hand the court should be alive to the potential of the mortgagee abusing this provision by invoking the power of sale maliciously or unlawfully, it should at the same time be mindful of the purpose of this provision being undermined by a disgruntled mortgagor making unfounded assertions of illegality, dispute over the amount outstanding, the value of the property, and so on, purposely to avoid or delay the sale. While the potential abuse by the mortgagee is mitigated by the fact that the amount paid by the mortgagor will eventually be refunded with interest by the mortgagee when the court establishes that the mortgagee's computation of the disputed outstanding amount or value of the property was incorrect, if the "pay now, argue later" rule were not enacted, there would be an incentive for a mortgagor to dispute a sale, which the mortgagor would not otherwise have done.

The considerations underpinning the "pay now, argue later" concept enacted in Regulation 13 of *The Mortgage Regulations, 2012* include the public interest in obtaining full and speedy settlement of commercial disputes and the need to limit the ability of recalcitrant debtors to use objection and appeal procedures strategically to defer the payment of borrowed funds. It was argued by counsel for the appellant that a dispute over the legality of the mortgage, the procedure of its enforcement or the amount outstanding is reason enough not to impose the 30% deposit requirement. If this were to be adopted as a valid reason, then the entire purpose of the provision would be defeated. All it takes is for the mortgagor to raise such a claim in the plaint, however frivolous. The legislative intent on the other hand can be achieved by interpreting "amount outstanding," to mean the amount as claimed by the mortgagee at the time the suit is filed.

Similarly, it is equally disingenuous to seek to defeat the purpose of the provision by adverting to Regulation 11 (2) of *The Mortgage Regulations, 2012* which requires a valuation report to be made not more than six months before the date of sale. That requirement is specific to the value at the

time of sale by the mortgagee, not necessarily for purposes of the adjournment or postponement of a sale. For the purposes of Regulation 13 (1), the value of the property at the time of execution of the mortgage would suffice. This is more so since it is a pre-dispute value that was agreed upon by the parties.

A statute must be so construed so as to effectuate its object and purpose, and not to defeat the same (see *Whitney v. Commissioner of Inland Revenue [1926] AC 37*). A construction which would defeat the very object of the legislative intent should be avoided. Therefore, all applications for temporary injunctions involving mortgaged property which result in adjournment or postponement of a sale, require the applicant to deposit 30% of the forced sale value of the mortgaged property or the outstanding amount, as a precondition to the grant of the temporary injunction order, have effectuated its object and purpose.

Section 98 of *The Civil Procedure Act* recognises the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Under its inherent jurisdiction, this Court may call for the record of any case which has been determined by its Registrar, and if the Registrar appears to have; (a) exercised a jurisdiction not vested in him or her in law; (b) failed to exercise a jurisdiction so vested; or (c) acted in the exercise of his or her jurisdiction illegally or with material irregularity or injustice, this Court may revise the case and may make such order in it as it thinks fit.

Having perused the pleadings, the arguments of counsel and the decision of the Registrar granting the interim injunction order restraining the respondent from undertaking a sale as mortgagee under a power of sale upon default of the mortgagor, I find this to be a proper case in which the power of review has to be exercised to prevent a miscarriage of justice by correcting a grave and palpable error committed by the court. In any event, Order 46 rule 1 (1) (b) of *The Civil Procedure Rules* permits the court to correct errors in its orders for "any other sufficient reason" and I find that nothing can prevent the court from rectifying its own error, because the doctrine of "*actus curiae neminem gravabit*", (i.e., an act of court shall prejudice none), can be invoked, for correcting the error committed by the court in the instant case, since that reason is sufficient on grounds, at least analogous to those specified in the rule.

It follows therefore that the leaned Registrar in the exercise of her jurisdiction acted illegally or with material irregularity or injustice when she granted an interim injunction order whose effect is the stoppage or adjournment of a sale by mortgagee without subjecting it to the condition that the applicant deposits of 30% of the amount outstanding. For that reason the order must be set aside. The ex-parte interim order issued herein on 2nd March, 2022 and extended on 4th March, 2022 is accordingly vacated.

It has been established by the law and the decided cases that, the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the *status quo* between the parties pending the disposal of the main suit. The conditions for the grant of an interlocutory injunction are now, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (see *E.A. Industries v. Trufoods, [1972] E.A. 420*). The conditions that have to be fulfilled before court exercises its discretion to grant an interlocutory injunction have been well laid out as the following:-

1. The Applicant has shown a *prima facie* case with a probability of success.
2. The likelihood of the applicants suffering irreparable damage which would not be adequately compensated by award of damages.
3. Where in doubt in respect of the above 2 considerations, then the application will be decided on a balance of convenience (see *Fellowes and Son v. Fisher [1976] I QB 122*).

These principles can be found in such cases as *American Cyanamid Co v. Ethicon Limited [1975] AC 396*; *Geilla v Cassman Brown Co. Ltd [1973] E.A. 358* and *GAPCO Uganda Limited v. Kaweesa and another H.C. Misc Application No. 259 of 2013*.

i. Whether the applicant has a *prima facie* case against the respondents.

First, a preliminary assessment must be made of the merits of the suit that has been filed against the respondents, to ensure that there is a "serious question to be tried." One of the criteria to be

applied when considering whether or not to grant a temporary injunction is disclosure by the applicant's pleadings, of a "serious triable issue," with a possibility of success, not necessarily one that has a probability of success (see *American Cyanamid v. Ethicon [1975] AC 396; [1975] ALL ER 504; Godfrey Sekitoleko and four others v. Seezi Peter Mutabazi and two others, [2001 –2005] HCB 80* and *Nsubuga and another v. Mutawe [1974] E.A 487*). There is no need to be satisfied that a permanent injunction is probable at trial; the court only needs be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. A serious question is thus any question that is not frivolous or vexatious. As long as the claim is not frivolous or vexatious, the requirement of a *prima facie* case is met.

The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried, and that there is at least a reasonable chance that the applicant will succeed at trial. The applicant needs to show only a reasonable likelihood of success on the merits. The applicant's burden on this part of the test is relatively low, and in most cases an applicant will be able to show that there is a serious question to be tried. The applicant is required to provide reasonably available evidence to satisfy the court with a sufficient degree of certainty that the applicant is the rights-holder and that his or her rights are being infringed, or that such infringement is imminent. The applicant must show a strong probability that the feared conduct and resulting damage will occur.

Although the merits of the parties' respective cases and their relative strengths are not to be considered at this stage, the court should bear in mind that in a suit of this nature, the applicant must show that the mortgagee flouted the procedure set down by law. The facts pleaded by the applicant simply relate to what she considers should have been fair treatment by the respondent in light of the impact Covid19 restrictions on her business. No contractual or statutory basis for that contention is discernible from the applicant's pleadings. I am therefore not satisfied that the claim is not frivolous or vexatious; there does not seem to be serious questions of law and fact to be tried. Accordingly, a *prima facie* case has not been established. The applicant therefore has not discharged her onus of proof in this respect.

ii. Whether the applicant will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue).

Second, the applicant must show that she will suffer irreparable harm if the court refused to grant the injunction and the respondents were allowed to continue in their course of conduct. "Irreparable" in this context refers not to the size of the harm that would be suffered, but its nature. If the harm could not be quantified by payment of money, or if the harm is not readily calculated or estimated, this part of the test will usually be satisfied. In some cases, the availability of damages often precludes such a finding.

Irreparable damage has been defined by *Black's Law Dictionary*, 9th Edition page 447 to mean; "damages that cannot be easily ascertained because there is no fixed pecuniary standard of measurement." It has also been defined as "loss that cannot be compensated for with money" (see *City Council of Kampala v. Donozio Musisi Sekyaya C.A. Civil Application No. 3 of 2000*). The purpose of granting a temporary injunction is for preservation of the parties, legal rights pending litigation. The court doesn't determine the legal rights to the property but merely preserves it in its current condition until the legal title or ownership can be established or declared. If failure to grant the injunction might compromise the applicants' ability to assert their claimed rights over the land, for example when intervening adverse claims by third parties are created, there is a very high likelihood of occasioning a loss that cannot be compensated for with money. In this case, the learned Assistant Registrar did not advert to this requirement. This too was an error of omission. Regarding the balance of convenience, the learned Registrar did not express an opinion at all. This too was an error of omission.

The Court may grant a temporary injunction if it is apparent that the respondent is about to embark on a course of action that would infringe an applicant's rights. The court will particularly be inclined to grant the injunction where there appears to be a *prima facie* breach of property rights, or where the potential harm that could flow should a court order not be granted is difficult or impossible to calculate and quantify at a later stage in the suit.

As an injunction is an equitable and discretionary remedy, it is a general rule that an injunction will not be granted where damages are an adequate remedy. Before an injunction is ordered, it must be established that an award of damages is not an adequate remedy. That type of claim can be made in exceptional cases involving breach of contract, akin to a breach of fiduciary duty, where the normal remedies are inadequate and where deterrence of others is an important factor. An injunction ought not to have been granted where the respondent would be restored to the financial position it would have been in had the distributorship not been terminated early. In order to establish that damages are not adequate, the innocent party will generally have to evidence either that a) the subject matter of the contract is rare or unique or b) damages would be financially ineffective.

Examples of rare or unique subject matters might be the sale of an interest in land (as no two pieces of land are the same) or a one-off antique vase. In both scenarios, damages may not be an adequate remedy because no market substitute exists, and the innocent party would therefore be unable to secure equivalent performance (no matter what the price). Examples of circumstances where damages may be financially ineffective might be where the defaulting party is insolvent and unable to pay; if damages would be difficult to quantify (e.g. a contract to indemnify); if an order for the payment of damages would be difficult to enforce (e.g. because any enforcement would need to be in a foreign country); or if an express term of the contract restricts or limits the damages recoverable for that particular breach.

I find that the pleadings show that it is common ground that the property in issue is purely commercial with no aesthetic or sentimental overtones. The transaction that has exposed the property to the danger of being lost too is of a purely commercial nature. This therefore essentially is a case in which, if the applicant succeeds, the court will be required to make an award of damages to compensate the rights holder for economic injury suffered through the violation of property rights, if proved, and this is not such a daunting task. I therefore do not find this to be case in which the applicant is likely to suffer loss or injury that cannot be quantified by payment of money, or that is not readily calculated or estimated. The applicant therefore has not discharged her onus of proof in this respect.

iii. Balance of convenience (whether the threatened injury to the applicant outweighs the threatened harm the injunction might inflict on the respondents).

Since the court is in doubt considering the outcome of its consideration of the first two factors, the third part of the test involves the court assessing which of the parties would suffer greater harm from the granting or refusal of the injunction pending trial. Unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the applicant has any real prospect of succeeding in his or her claim at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

This part of the test is referred to as the "balance of convenience." Balance of convenience means comparative mischief or inconvenience that may be caused to the either party in the event of refusal or grant of injunction. It is necessary to assess the harm to the applicant if there is no injunction, and the prejudice or harm to the respondent if an injunction is imposed. The courts examine a variety of factors, including the harm likely to be suffered by both parties from the granting or refusal of the injunction, and the current *status quo* as at the time of the injunction.

The Court has the duty to balance or weigh the scales of justice by ensuring that the suit is not rendered nugatory while at the same time ensuring that a respondent is not impeded from the pursuit of his or her contractual rights. No doubt it would be wrong to grant a temporary injunction order pending disposal of the suit where the suit is frivolous or where such order would inflict greater hardship than it would avoid. Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application, some disadvantages which his or her ultimate success at the trial may show he or she ought to have been spared and the disadvantages may be such that the recovery of damages to which he or she would then be entitled would not be sufficient to compensate him or her fully for all of them.

The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his or her succeeding at the trial is always a significant factor in assessing where the balance of convenience lies. The governing principle is that the court should first

consider whether if the applicant were to succeed at the trial in establishing his or her right to a permanent injunction, he or she would be adequately compensated by an award of damages for the loss he or she would have sustained as a result of the respondent's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the respondent would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the applicant's claim appears to be at this stage.

If, on the other hand, damages would not provide an adequate remedy for the applicant in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the respondent were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated by the applicant for the loss he or she would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages would be an adequate remedy and the applicant would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

For example, if the *status quo* is that the respondent has been carrying on the activity complained of for a long period of time, and the applicant knew or should have known of the activity, but has not previously objected, the court will be reluctant to make an order preventing the respondent from continuing the conduct. On the other hand, if the respondent has only recently embarked on the conduct and has not expended significant resources, then this may well place the balance of convenience in favour of the applicant.

To the contrary, if the respondent is enjoined temporarily from doing something that he or she has not done before, the only effect of the interlocutory injunction in the event of his or her succeeding at the trial is to postpone the date at which he or she is able to embark upon a course of action which he or she has not previously found it necessary to undertake; whereas to interrupt him or her in the conduct of an established enterprise would cause much greater inconvenience to him or her since he or she would have to start again to establish it in the event of his or her succeeding at the trial.

From the plaint, the relevant considerations are that the property was mortgaged to the respondent during the month of November, 2020. The *status quo* for the last one and a half years is that the respondent has not been receiving repayment of the loan instalment as and when they fall due, yet the applicant does not deny indebtedness. The applicant seeks the interlocutory injunction so as to protect her against injury by violation of its property rights, for which I have already found she could be adequately compensated for in damages if the uncertainty were resolved in her favour at the trial. The applicant's need for such protection must be weighed against the corresponding need of the respondent to be protected against injury resulting from being prevented from exercising its own legal rights for which it may not be adequately compensated in damages if the uncertainty were resolved in its favour at the trial. Having done so, I find that the balance of convenience is in favour of the respondent. In light of all the foregoing, the application is devoid of merit. The application is accordingly dismissed. With costs to the respondent.

Delivered electronically this 23rd day of March, 2022

……Stephen Mubiru……..
Stephen Mubiru
Judge,
23rd March, 2022