

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

**MISCELLANEOUS APPLICATION No. 0204 OF 2022
(Arising from Civil Suit No. 0813 of 2022)**

MASIKO MEDARD

..... **APPLICANT**

VERSUS

EQUITY BANK LIMITED

..... **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

PROCEEDINGS

16th March, 2022.


2:06 pm

Attendance

Mr. Busuulwa Cypress Bill, Court Clerk.

None of the parties nor their counsel is in court.

EX-TEMPORE ORDER

 MAVEN <small>ADVOCATES</small>	
Date Received	17/03/22
Time	11.23 am
File No.	22
Received by:	November, 2021 from <i>[Signature]</i>

The application comes before this court by virtue of a letter dated 17th March, 2022 from counsel for the applicant, M/s Katende, Sempebwa and Co. Advocates complaining that an *ex-parte* interim order restraining the respondent from undertaking a sale by mortgagee advertised to take place on 17th March, 2022 was issued yesterday 15th March, 2022 by the Deputy Registrar of this court. Counsel contends that the order was issued erroneously for the following reasons; the applicant was not required to make the mandatory 30% deposit of the outstanding amount, it was sought and issued for the purpose of frustrating the debt recovery process which the applicant was are of all the time but chose to seek judicial intervention at the last moment.

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.

5 Having perused the pleadings, the arguments of counsel and the decision of the Deputy Registrar granting the *ex-parte* interim order of stay 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.

15 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 Kasula 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. 38 of 2014 and *Paunocks Enterprises Ltd and others v. Stanbic Bank (U) Ltd*, H. C. Miscellaneous Application No. 1113 of 2014). Regulation 20 13 of *The Mortgage Regulations, 2012* provides as follows:

13. Adjournment or stoppage of sale.

- 25 (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
- 30 (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.

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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 (B1) at 1141) that:

10 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

15 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

20 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

25 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

30 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.

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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.

15 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.

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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

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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.

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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.

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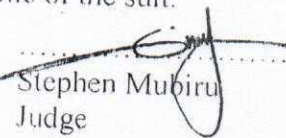
A statute must be so construed so as to effectuate its object and purpose, and not to defeat the same (see *Whitney v. Commissioner of Inland Revenue [1926] AC 37*). A construction which would defeat the very object of the legislative intent should be avoided. Therefore, all applications for temporary 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.

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It follows therefore that the learned Deputy 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 15th March, 2022 is accordingly vacated. The costs of this proceeding shall abide the outcome of the suit.

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Stephen Mubiru
Judge
16th March, 2022.
2.30 pm.